No. 07-14-00006-CV

TILED IN 7th COURT OF APPEALS IN THE SEVENTH COURT OF APPEALS AMARILLO, TEXAS AMARILLO, TEXAS PEGGY CULP Clerk

CITY OF LUBBOCK, Appellant

v.

COYOTE LAKE RANCH, LLC Appellee

Appealed from Cause No. 9245 In the 287th Judicial District Court of Bailey County, Texas

APPELLANT, CITY OF LUBBOCK'S, BRIEF

CITY OF LUBBOCK, TEXAS

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APPELLANT REQUESTS ORAL ARGUMENT

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TABLE OF CONTENTS

IDENTITY OF PARTIES & COUNSEL	i
TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REQUEST FOR ORAL ARGUMENT	2
ISSUE PRESENTED FOR REVIEW	2
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	7
ARGUMENT	10
PRAYER	22
CERTIFICATE OF COMPLIANCE	23
CERTIFICATE OF SERVICE	23
APPENDIX	24
1953 Deed	
Order Granting Temporary Injunction	
Plaintiff's First Amended Original Petition and Application	
For Temporary Injunction	
City of Lubbock's Original Answer	
City of Lubbock's Request for Findings of Fact and	TAD +
Conclusions of Law	TAR 5
Defendant, City of Lubbock's, Supplemental Request for	
Documents to be Included in the Clerk's Record	TAR 6
Getty Oil Co. v. Jones	
Landreth v. Melendez	
Davis v. Devon Energy	

Schmidt v. Richardson	TAB	10
Texas Rules of Civil Procedure 683	TAB	11

INDEX OF AUTHORITIES

CASES
Amalgamated Acme Affiliates, Inc., v. Minton, 33 S.W.3d 387
(Tex. App. – Austin 2000, no pet.)10
B.L. McFarland Drilling Contractor v. Connell, 344 S.W.2d 493
(Tex. Civ. App. – El Paso), dism'd at 347 S.W.2d 565 (Tex. 1961)
Ball v. Dillard, 602 S.W.2d 521 (Tex. 1980)12
Butnaru v. Ford Motor Co., 84 S.W.3d 198 (Tex. 2002)
C.H. Leavell & Company v. Leavell Company, 570 S.W.2d 404
(Tex.Civ.App. – El Paso 1978, no writ)22
Chevron v. Stoker, 666 S.W.2d 379
(Tex. App. – Eastland 1984, writ dism'd)22
Davis v. Devon Energy Prod. Co., L.P., 136 S.W.3d 419
(Tex. AppAmarillo 2004, no pet.)16
Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96
(Tex. Civ. App. – Eastland 1987, writ denied)14
Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (Tex. 2012)12
Fleming Foundation v. Texaco, Inc, 337 S.W.2d 846
(Tex. Civ. App. – Amarillo 1960, writ ref'd n.r.e.)14
Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971)
Grayson Enterprises, Inc. v. Texas Key Broadcasters, Inc., 388 S.W.2d 204
(Tex.Civ.App. – Eastland 1965, no writ)

Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972)	
····, ··· · · · · · · · · · · · · · · ·	
Schmidt v. Richardson, S.W.3d, 2014 WL 117418 (Tex. App. – Dallas, no pet. h.)	
Robinson Drilling Co. v. Moses, 256 S.W.2d 650 (Tex. Civ. App. – Eastland 1953, no writ)	
Operation Rescue-National v. Planned Parenthood of Houston Se. Tex., Inc., 975 S.W.2d 546 (Tex. 1998)	
Merriman v. XTO Energy, Inc. 407 S.W.3d 244, 249 (Tex. 2013)	
Luckel v. White, 819 S.W.2d 459 (Tex. 1991)17	
Landreth v. Melendez, 948 S.W.2d 76 (Tex. App. – Amarillo, 1997, no writ)	
Joyner v,. R.H. Dearing & Sons, 134 S.W.3d 757 (Tex. Civ. App. – El Paso 1939, writ dism'd, judgment correct)14	
11umble Oil & Rejining Co. v. Williams, 420 S.W.20 133 (1ex. 1907)14	
Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133 (Tex. 1967)14	

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Appellant

 \mathbf{v}_{\bullet}

COYOTE LAKE RANCH, LLC Appellee

Appealed from the 287th Judicial District Court of Bailey County, Texas

APPELLANT, CITY OF LUBBOCK'S, BRIEF

STATEMENT OF THE CASE

This lawsuit was filed by Coyote Lake Ranch, LLC, hereinafter sometimes referred to simply as "Coyote" or "Plaintiff," against the City of Lubbock on November 13, 2013 (CR 4). The Court signed a Temporary Restraining Order on November 13, 2013 (CR 34). On November 26, 2013, Plaintiff filed its First

Amended Original Petition and Application for Temporary Restraining Order (CR 36). The City of Lubbock filed its Original Answer on November 26, 2013 (CR 45). A hearing was held by the Court as to Plaintiff's Request for a Temporary Injunction on November 26, 2013. The Court signed its Order Granting Temporary Injunction on December 23, 2013 (CR 54). The City filed its Notice of Appeal on January 8, 2014 (CR 57). The City filed its Request for Findings of Fact and Conclusions of Law on January 8, 2014 (Apx.5). Trial is currently set for November 12, 2014 (CR 57).

REQUEST FOR ORAL ARGUMENT

Appellant, CITY OF LUBBOCK, respectfully requests oral argument.

ISSUE PRESENTED FOR REVIEW

Whether the trial court abused its discretion in its Order Granting Temporary Injunction which is based on the premise that the accommodation doctrine applies in this case.

STATEMENT OF FACTS

City of Lubbock's Acquisition of Water Rights in 1953

In 1953, the City of Lubbock began to acquire groundwater rights in, on, over and under lands in Bailey County, Texas (RR Vol. II 74:21-24). The City began producing water from these well fields in the late 1950's or early 1960's (RR Vol. II 74:23-24). A map showing the locations of the City's well field in

Bailey County is shown on the Map attached as Defendant's Exhibit 1 (RR Vol. II 79-75: 24-15) (RR Vol. III: 13). The Coyote Ranch is located within the pink portion of this map (RR Vol. II 75: 16-24, Vol. III 13). Most of the wells currently drilled are to the east of Coyote Ranch and the City has only drilled around seven (7) wells on the Coyote Ranch itself (RR Vol. II 76-77: 17-7, Vol. III 13).

1953 Deed

There is no dispute between the parties that the 1953 Deed from the Purtells to the City of Lubbock is the document that conveyed the groundwater rights to the City of Lubbock within Coyote Ranch (RR Vol. II 7:2-7, 24:4-14, Vol. III 4). The City has attached an identical and enlarged copy of the Deed for the Court's convenience in the Appendix for the Court's reference (Apx.1). This enlarged copy is also a "clean" copy and is not obstructed by highlighted markings on the document.

Pertinent Portions of the Deed

The 1953 Deed conveys the groundwater to the City, along with broad and expansive rights to utilize the surface to explore, produce and transport the groundwater. The Deed conveys to the City, in pertinent part:

...and by these presents do Grant, Sell and Convey unto the said CITY OF LUBBOCK, a municipal corporation of Lubbock County, Texas, all of the percolating and underground water in, under, and that may be produced from the hereinafter described tracts of land, situated in Bailey County, Texas, together with the exclusive right to take such water from said tracts of land and to use the same for disposition to cities and towns situated in Bailey,

Cochran, Hockley, Lamb and Lubbock Counties, Texas, together with the full and exclusive rights of ingress and egress in, over, and on said lands, so that the Grantee of said water rights may at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring producing, and getting access to percolating and underground water; together with the rights to string, lay, construct, and maintain water and fuel pipelines and trunk, collector, and distribution water lines, power lines, communication lines, air vents with barricades, observation wells with barricades, if required, not exceeding ten (10) square feet of surface area, reservoirs, booster stations, houses for employees, and access roads on, over and under said lands necessary or incidental to any of said operations, together with the right to erect necessary housing for wells, equipment and supplies, together with perpetual easements for all such purposes, together with the rights to use all that part of said lands necessary or incidental to the taking of percolating and underground water and the production, treating and transmission of water therefrom and delivery of said water to the water system of the City of Lubbock only;... (RR Vol. III: 4 and the attached enlarged Deed at Apx.1).

The groundwater and rights related thereto conveyed to the City of Lubbock in the 1953 Deed are very broad and expansive and include not only all of the percolating and underground water, but also includes the use of the surface to drill, produce and transport the water, among numerous other rights. Plaintiff has conceded that the City has expansive rights to produce and develop this water field. (RR Vol. II 7: 8-15).

Prior Reservations or Exceptions of Groundwater

In the 1953 Deed, the Grantors made the conveyance subject to the rights previously reserved by (1) John L. Birdwell, et. al., to:

[s]uch quantities of water as may be required to carry on usual and normal domestic and ranching operations and undertakings upon said lands, excluding irrigation, and such quantities of water as may be required for

normal and customary operations for the production of oil and gas and other minerals from said lands, and by normal and customary operations for the production of oil and gas and other minerals is meant such operations as are now normal and customary in the area where said land is located... (RR Vol. III: 4 and the attached enlarged Deed at Apx.1); and

(2) John L. Birdwell, et. al., to:

[t]he right to drill and use water from one irrigation well for agricultural, irrigation purposes only, such wells...to be located [certain lands described therein]. (RR Vol. III: 4 and the attached enlarged Deed at Apx. 1).

The rights to use of water to which the 1953 Deed are made subject do not form a basis, in whole or in part, for the trial court's Order Granting Temporary Injunction.

Compensation to Landowner for Use of Surface and Damage to Surface

The 1953 Deed states that the owner of the groundwater rights shall pay:

[T]hree and No/100 (\$3.00) Dollars per acre per year for all ground surface occupied by housing facilities, fenced enclosures and roads constructed and used by it and to pay for damages to any surface property proximately caused by any operations or activities on said land by the City of Lubbock, its agents and employees, for which no payment is otherwise provided herein... (RR Vol. III: 4 and the attached enlarged Deed at Apx. 1).

No Wells to be Drilled within 1/4 Mile of Four (4) Existing Windmill Sites

The 1953 Deed provides that the City cannot drill any water well within ½ mile of any existing windmill site listed in Exhibit "A" to the 1953 Deed. There were four (4) such windmill sites listed in the Exhibit. While the Plaintiff has plead that the City intended to drill such wells, the City has stated that it has no

intention of drilling any such wells, (RR Vol. II 27: 3-9, 84: 2-5), and the trial court did not find that the City had any intent to drill any wells within ¼ mile of any such windmill site. This issue is not relevant in the issue before this Court.

Plaintiff's Theory for the Temporary Injunction – Accommodation Doctrine

While Plaintiff listed four (4) causes of action against the City in its First Amended Petition, inverse condemnation (CR 40), breach of contract (CR 40-41), negligence (CR 42) and declaratory judgment (CR 42), Plaintiff's argument to the trial court for the issuance of a temporary injunction was based on one legal theory – the application of the Accommodation Doctrine (RR Vol. II. 7-8: 16-20).

Court's Ruling as to the Temporary Injunction

On December 2, 2013, the trial court issued the temporary injunction based on Plaintiff's argument that the accommodation doctrine applied in this case. In the Order Granting Temporary Injunction the Court stated:

[P]ursuit of Defendant's well field plan has caused damage to the Ranch, and further damage will occur absent the use of reasonable means to ameliorate that damage; that Defendant's proposed well field plan is likely accomplished through reasonable alternative means that do not unreasonably interfere with the Ranch's current uses; and that the Ranch has suffered harm caused by Defendant's activities and will likely suffer irreparable harm in the future (CR 54).

The Court's Order is entirely predicated on the assumption that the accommodation doctrine applies in this case. The Order prohibits the City of Lubbock from

performing activities in pursuit of preparing its water well field and specifically states that the City is prohibited from:

- a. Mowing, blading, or otherwise destroying the growing grass on the surface of the Ranch;
- b. Proceeding with any test hole drilling or water well drilling without consulting plaintiff regarding potential impacts to the surface of the Ranch;
- c. Erecting power lines to proposed well fields on the Ranch (CR 55).

It is important to note that, in the Order Granting Temporary Injunction, the trial court did NOT find that the City of Lubbock had performed, or was planning on performing or initiating, any activities that it had no right to do pursuant to its ownership and rights granted in the 1953 Deed.

SUMMARY OF THE ARGUMENT

To obtain a temporary injunction the applicant must show:

- (1) A cause of action against the defendant;
- (2) A probable right to the relief sought; and
- (3) A probable, imminent, and irreparable injury in the interim... *Butnaru* v. *Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

The trial court was incorrect in granting the temporary injunction as the Plaintiff cannot prevail on any of the above-listed criteria; specifically because the

accommodation doctrine does not apply, as a matter of law, in this case. Since the accommodation doctrine is inapplicable, Plaintiff has not plead a valid cause of action as it relates to the accommodation doctrine, and does not have a probable right to the relief sought.

The trial court issued its temporary injunction based on the finding that the accommodation doctrine applies in this instance. The basis for the trial court's entering of the temporary injunction is incorrect as a matter of law. The accommodation doctrine does not apply in this situation as the accommodation doctrine was created by the courts to "flesh out" the duty of a mineral estate owner to exercise its broad implied rights of use of the surface estate in "due regard" to the surface owner. In Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971), the Texas Supreme Court discussed the duty of a mineral owner to exercise its implied rights to use the surface estate in "due regard" to the surface owner, and held that under the facts of that case, the mineral owner had the duty to accommodate the surface owner. *Id.* 470 S.W.2d at 621-22. However, the accommodation doctrine only applies in the mineral estate/surface use context (i) because there are two separate and distinct estates, the mineral estate and the surface estate, with the mineral estate being dominant over the servient surface estate; with (ii) the implied right of surface use in favor of the mineral estate owner to be exercised in "due regard" to the surface owner.

In the case at bar, there are not two separate estates of property. The groundwater, owned predominantly by the City of Lubbock, is part of the surface estate, the remainder of which being purportedly owned by the Plaintiff, Coyote Lake Ranch, LLC. The rights of the City to use the surface to explore, produce and transport the groundwater are set forth explicitly in the 1953 Deed. It is the 1953 Deed that the courts refer to determine what rights the City has to use the surface; not the accommodation doctrine.

The accommodation doctrine, which arises out of the implied surface use right enjoyed by the dominant mineral estate; specifically, the duty to exercise such implied surface use rights in "due regard" to the surface owner, does not apply. Further, the trial court did not find that the City was acting (or was going to act) beyond the rights granted to it under the 1953 Deed. The trial court was in error in granting a temporary injunction based on the accommodation doctrine.

Since the accommodation doctrine does not apply, and that is the theory in which the trial court based its temporary injunction, the Plaintiff has not shown a cause of action against the City based on this theory and cannot show a probable right of recovery based on the accommodation doctrine.

Since it is the language in the 1953 Deed that determines the City's rights to sue the surface, this Court should refer to the Deed to determine if the Order Granting Temporary Injunction frustrates the City's rights. Indeed, the Order's

specific prohibitions are in conflict with the City's rights expressed in the 1953 Deed. As such, the Temporary Injunction should be dissolved.

Also, any damages that the surface owner may incur as a result of the City's activities on the surface are contemplated and explicitly provided for in the 1953 Deed. As such, Plaintiff has an adequate remedy at law for any surface damage caused by the City regarding its surface activities.

ARGUMENT

Standard of Review

The standard of review for the trial court's grant of a temporary injunction is abuse of discretion. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198. 204 (Tex. 2002). Texas Rule of Civil Procedure 683 states that, "[E]very order granting an injunction...shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained..." As such, the review of the Court of Appeals is confined to the validity of the order. "[O]our review is confined to the validity of the order that grants or denies the injunctive relief." *Schmidt v. Richardson*, _____ S.W.3d _____, 2014 WL 117418 (Tex. App. – Dallas, no pet. h.); *citing Amalgamated Acme Affiliates, Inc.*, *v. Minton*, 33 S.W.3d 387, 392 (Tex. App. – Austin 2000, no pet.). "The determination of whether imminent harm exists is a question of law for the court." *Schmidt, Id.* at *2; *citing*

Operation Rescue-National v. Planned Parenthood of Houston Se. Tex., Inc., 975 S.W.2d 546, 554 (Tex. 1998).

Introduction

The trial court erred in granting the temporary injunction enjoining the City from conducting operations on the surface of the property in developing its water well field. The trial court based this temporary injunction on the premise that the surface owner, Coyote Lake Ranch LLC (Coyote), was owed a duty to accommodate by the City of Lubbock. In making its ruling, the trial court said that "Defendant's proposed well field plan is likely accomplished through reasonable alternative means that do not unreasonably interfere with the Ranch's current uses" (CR 54).

No such duty exists. The temporary injunction against the City of Lubbock should be dissolved.

Groundwater Ownership

Pursuant to the 1953 Deed, (RR Vol. III: 4, Apx. 1), the City was conveyed the groundwater under the lands at issue. Coyote now asserts that it is the owner of the surface estate, less and except the groundwater owned by the City of Lubbock.

In Texas, groundwater is a part of the surface estate in the lands, and owned in place by the surface owner, unless such ownership has been severed from the remainder of the surface estate, which has occurred in this case by virtue of the 1953 Deed. *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 831-32 (Tex. 2012). Due to the nature of the severed groundwater estate, being a part of the surface estate and enjoying no dominance over the remainder of the surface estate, there is no right to utilize the surface of land to explore and produce the groundwater estate, absent express contractual right or an independent property interest in the surface estate.

Nature of the Groundwater Estate

The trial court found that a temporary injunction should be granted against the City due to the fact that the City could explore and produce its groundwater estate "through reasonable alternative means that do not unreasonably interfere with the Ranch's current uses;" (CR 54). It is important to note that the trial court did not find that the City's proposed well field activities would be beyond the rights granted to the City in the 1953 Deed. In essence, the trial court held that the City has an independent duty to accommodate Coyote's current uses of the surface, as argued by Coyote, notwithstanding the clear rights granted to the City in the 1953 Deed, stating in detail the means in which it can use the surface to develop the well field and setting forth the damages owed to the surface owner for certain In issuing this Order, the trial court has incorrectly applied the activities. accommodation doctrine. This doctrine applies in the mineral estate/ surface estate situations and is used to "flesh out" the "due regard" element of the implied

surface use rights in favor of the mineral owner related to the exploitation of the mineral estate, to the City of Lubbock in utilizing its rights under the 1953 Deed to develop its water well field.

The trial court is in error in applying the accommodation doctrine in this case. First, there is no dispute that Coyote acquired the property with notice of the City's ownership of the groundwater: both constructive notice, the Deed being filed of record in the Real Property Records of Bailey County, Texas at the time Coyote purchased the lands at issue, and actual notice, the groundwater production activities by the City on the Coyote property being open and obvious at the time Coyote purchased the lands at issue. (RR Vol. III:4, and the enlarged Deed at Apx. 1) (filed for record January 30, 1953, at 4:45 P.M.. Volume 59, Page 165, Deed Records, Bailey County, Texas).

Second, there is no duty under Texas law imposed upon the groundwater estate owner to accommodate, or use "reasonable alternative means", to explore and produce the severed groundwater. No such duty has ever been found by the courts in the State of Texas and there is no justification for the imposition of such duty.

Nature of Mineral Estate

To illustrate the absence of any justification for the imposition of an implied duty upon groundwater estate owners, as asserted by Coyote, an examination of

rights of mineral estate owners to utilize the surface estate in its mineral exploration and production activities is helpful.

The severed mineral estate is the dominant estate and the surface estate is the servient estate, absent a contractual modification of such relationship. *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967). As the dominant estate, the severed mineral owner has the right, without any express grant of such rights, to use as much of the surface as is reasonably necessary to exploit the mineral estate, in, on, and under the subject tract of real property, with such rights to be exercised with due regard for the rights of the surface owner. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621-22 (Tex. 1971).

The dominant nature of the mineral estate provides great rights over the servient surface estate. *See e.g.*, *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260 (Tex.Civ.App. – El Paso 1958, no writ)(right to determine location of wells); *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650 (Tex. Civ. App. – Eastland 1953, no writ)(right to determine timing of mineral exploration of production activities); *Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980) (right of access over and across the surface); *Delhi Gas Pipeline Corp. v. Dixon*, 737 S.W.2d 96 (Tex. Civ. App. – Eastland 1987, writ denied) (right to build and maintain pipelines); *Joyner v. R.H. Dearing & Sons*, 134 S.W.2d 757 (Tex. Civ. App. – El Paso 1939, writ dism'd, judgment correct) (right to build and maintain housing for employees); *Fleming*

Foundation v. Texaco, Inc., 337 S.W.2d 846 (Tex. Civ. App. – Amarillo 1960, writ ref'd n.r.e.) (right to use of water); Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950) (right to conduct geophysical operations); Warren Petroleum Corp. v. Martin, 271 S.W.2d 410 (Tex. 1954) (spilling of oil in vicinity of tanks); and B.L. McFarland Drilling Contractor v. Connell, 344 S.W.2d 493 (Tex. Civ. App. – El Paso), dism'd at 347 S.W.2d 565 (Tex. 1961) (right to use of caliche).

Even though the severed mineral estate is dominant over the surface estate and enjoys great rights to use of the surface related to its mineral exploitation activities without an express grant of such rights, such mineral owner must nevertheless exercise such rights with "due regard" to the surface estate. *See Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621-22 (Tex. 1971). This duty to exercise such implied rights with "due regard" to the surface owner led to the creation of the accommodation doctrine, first recognized in *Getty, supra*. In *Getty*, the Texas Supreme Court held that:

[T]he due regard concept defines more fully what is to be considered in the determination of whether a surface use by a [mineral lessee] is reasonably necessary... But under the circumstances indicated here; i.e., where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the [mineral lessee] whereby the minerals can be recovered, the rules of reasonable usage of the surface my require the adoption of an alternative by the [mineral lessee]. *Getty*, 470 S.W.2d at 622.

Accommodation Doctrine not Applicable to Groundwater Estate

The mineral estate owners' duty to accommodate the surface estate owner arises solely from such mineral estate owners' dominant right to utilize the surface estate, without the express grant of such rights, fettered by such owners' legal duty to exercise such implied rights with "due regard" to the surface estate owner. As discussed above, the owner of the groundwater enjoys no dominance over the owner of the remaining surface estate and therefore, no implied rights of use of such estate – rather the groundwater is a part of such surface estate of the land at issue. *See Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972). Without such dominant nature, there is no implied right to utilize the surface of the Coyote Ranch, with "due regard" or otherwise. The sole and only rights of the City to utilize the surface of Coyote Ranch, as the groundwater estate owner, are those expressly provided to it in the 1953 Deed.¹

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¹ Much authority exists regarding the scope and applicability of the accommodation doctrine as concerns severed mineral estate owners' use of the surface. However, due to the inapplicability of such concepts to the case at issue, a discussion of such authority is omitted herein. It is fair to say, however, that Coyote has neither pleaded nor proven, which burden of proof that the accommodation doctrine would be applicable is on the surface owner, that (i) the City's use completely precludes or substantially impairs the existing use (ranching or hunting) of Coyote; and (ii) there is no reasonable alternative method available to Coyote by which its existing use can be continued. *See Getty Oil Co. v. Jones*, 470 S.W.2d at 628; *see also Davis v. Devon Energy Prod. Co., L.P.*, 136 S.W.3d 419, 424 (Tex. App.-Amarillo 2004, no pet.). Further, even in the remote event that Coyote has, or could, carry the burden of proof on the above cited elements, Coyote has the further burden of proving that there are alternative reasonable, customary and industry accepted methods available to the City which would allow the City's exploration and production activities and allow Coyote's existing use. *See Merriman v. XTO*

Absent the grant of such express rights, the City would have no right to utilize the surface of the Coyote Ranch. The trial court <u>did not</u> find that the City's proposed well field plan is or would be beyond City's contractual rights to explore and produce the groundwater as set forth in the 1953 Deed. Rather, the trial court incorrectly applied accommodation duties upon the City, such finding being incorrect and inapposite to the case before it.

In the trial court, the Plaintiff offered no authority, in Texas or any other jurisdiction, where a court imposed a duty of accommodation on a severed groundwater estate. The holding by the trial court, in addition to incorrectly applying a duty to the City, disregards the clear intention of the parties to the 1953 Deed, and instead substitutes its opinion as to the scope of applicable surface use in lieu thereof, an action that is impermissible. *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991). Accordingly, the trial court's grant of the temporary injunction against the City is contrary to established Texas law and should be dissolved.

Effect of Contractual Provision on Accommodation Doctrine

It is interesting to note that the accommodation doctrine, as applicable to the implied right of mineral owners to utilize the surface estate, is itself negated by express terms providing the means of mineral exploration and production operations. *See Landreth v. Melendez*, 948 S.W.2d 76 (Tex. App. – Amarillo,

Energy, Inc. 407 S.W.3d 244, 249 (Tex. 2013; see also Tarrant County Water Control & Improvement Dist. v. Haupt, Inc., 854 S.W.2d 909, 911-12 (Tex. 1993).

1997, no writ). In *Landreth*, the surface owner claimed its ownership in lands through a deed that reserved minerals and provided in such reservation that the mineral estate owner had:

[T]he right...to take all usual, necessary and convenient means for working... and removing.. said oil, gas and other minerals.. *Landreth*, 948 S.W.2d at 78-79.

The surface owner opposed the mineral owner's proposed location of two new wells and alleged that the owner of the severed mineral estate had a duty to accommodate the surface owner's circular irrigation system related to such new wells. After the trial court found that the accommodation doctrine required the severed mineral estate owner to use low profile pump jacks, similar to the pump jacks at issue in the *Getty Oil Co. case, supra*, the Amarillo Court of Appeals reversed and remanded, holding that the accommodation doctrine did not apply in that circumstance. Instead, the Amarillo Court of Appeals held that the surface owner had the burden of proof to establish (instead of accommodation doctrine elements) that the mineral estate owners' operations are not by "usual, necessary and convenient means," as provided in the deed severing the mineral estate from the surface estate of the lands at issue.

Accordingly, even in the event some sort of accommodation duty would apply regarding the use of the surface estate by the severed groundwater owner, which the City contends is clearly not the law in Texas, the rights expressed in the

1953 Deed to the City would prevail over any such general accommodation principles.

Specific Terms of the 1953 Deed and the Trial Court's Order

The Order Granting Temporary Injunction enjoined the City from:

- a. Mowing, blading, or otherwise destroying the growing grass on the surface of the Ranch;
- b. Proceeding with any test hole drilling or water well drilling without consulting plaintiff regarding potential impacts to the surface of the Ranch;
- c. Erecting power lines to proposed well fields on the Ranch. (CR 55).

These prohibitions are in conflict with the power given to the City in the 1953 Deed. The Deed specifically states that the City:

[M]ay at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring, producing and getting access to percolating and underground water;...(RR Vol. III: 4 and the attached enlarged Deed at Apx.1).

The 1953 Deed specifically gives the City the right to go on the land and drill test wells and water wells. There is nothing in the 1953 Deed that provides that it must consult with the surface owner before drilling test wells and water wells regarding potential impacts to the surface.

Also, the 1953 Deed specifically gives the City the right to erect power lines. The Court's Order prohibits the City from erecting power lines which is specifically allowed in the 1953 Deed.

The 1953 Deed also contains a broad provision which allows the City to:

[U]se all that part of said lands necessary or incidental to the taking of percolating and underground water... (RR Vol. II: 4 and the attached enlarged Deed at Apx. 1).

The mowing of grass is incidental to the production of the groundwater for at least two reasons:

- (1) Access the mowing allows the City to get to the well sites and other production facilities; and
- (2) Fire suppression and prevention the vehicles the City utilizes in its operations have catalytic converters, with resultant increase in fire danger if tall vegetation is present around the engines. (RR Vol. II 88: 12-15, 89: 3-9).

The mowing of grass is a necessary part of the process for the City in developing its well field. Of course, as part of the 1953 Deed, it provides for payment in the event of damage to the surface.

Conclusion as to the Accommodation Doctrine

It is undisputed that the groundwater under the Coyote Ranch is owned by the City. It is also undisputed that the City was granted specific rights over the remainder of the surface in the 1953 Deed to develop, produce and transport the groundwater owned by it. Due to the fact that the groundwater estate is not dominant over the remainder of the surface estate, no rights to use the surface of the Coyote Ranch exist in favor of the City outside of those rights expressly

provided in the 1953 Deed. The accommodation doctrine does not apply in the case before this Court. As such, the trial court abused its discretion in issuing the temporary injunction since this is not a valid cause of action and Coyote does not have a probable right of recovery as to this cause of action.

Importantly, the trial court did not find that the contemplated use of the surface by the City was beyond the rights granted to it under the 1953 Deed. Further, the City has shown that the activities specifically prohibited in the Order Granting Temporary Injunction are expressly allowed pursuant to the 1953 Deed. As a result, the trial court's grant of the temporary injunction was contrary to Texas law and constitutes an abuse of discretion. As such, the temporary injunction issued by the trial court should be dissolved.

Damage to Surface Provided for in the 1953 Deed

In the trial court's Order Granting Temporary Injunction, the Court said that:

[P]ursuit of Defendant's well field plan has caused damage to the ranch, and further damage to the Ranch will occur absent the use of reasonable means to ameliorate that damage...the Ranch has suffered harm caused by Defendant's activities and will likely suffer irreparable harm in the future (CR 54).

However, damage to the surface of the property is clearly contemplated by the 1953 Deed and a remedy is provided therein. Because the City will have to use the surface of the property in developing its well field, there could be damage to the surface. This damage to the surface is contemplated and a remedy provided for in the 1953 Deed. The pertinent portion of the 1953 Deed states:

[I]n accepting and recording this deed, the City of Lubbock, its successors and assigns, covenants and agrees to pay Three and no/100 (\$3.00) Dollars per acre per year for all ground surface occupied by housing facilities, fenced enclosures and roads constructed and used by it and to pay for damages to any surface property proximately caused by any operations or activities on said land by the City of Lubbock, its agents and employees, for which no payment is otherwise provided herein...(RR Vol. III:4, Apx. 1).

"Contractual rights are not enforced by writs of injunction absent exceptional circumstances, since an inadequate remedy at law and irreparable injury are rarely shown when a suit for damages for breach of contract is available." *Chevron v. Stoker*, 666 S.W.2d 379, 382 (Tex. App. – Eastland 1984, writ dism'd). *See also C.H. Leavell & Company v. Leavell Company*, 570 S.W.2d 404 (Tex.Civ.App. – El Paso 1978, no writ); and *Grayson Enterprises, Inc. v. Texas Key Broadcasters*, Inc., 388 S.W.2d 204 (Tex.Civ.App. – Eastland 1965, no writ). Since there is clearly an adequate remedy at law for any damage to the surface property, Coyote has not met the requisites for having an injunction.

PRAYER

WHEREFORE, premises considered, the City of Lubbock prays that the Order Granting Temporary Injunction by the trial court be dissolved, and for such other and further relief to which it may show itself justly entitled.

CERTIFICATE OF COMPLIANCE

Pursuant to Tex.R.App.P. 9.4(i)(3), undersigned counsel certifies that this brief contains 6,261 words printed in a proportionally spaced typeface.

/s/ Jeff Hartsell JEFF HARTSELL

CERTIFICATE OF SERVICE

On the 12^{TH} day of February, 2014, a copy of the foregoing Appellant's

Brief was served on counsel for Appellee as follows:

Marvin W. Jones Sprouse Shrader Smith, P.C. P O Box 15008 Amarillo, Texas 79105-5008 806-468-3300 Fax 806-373-3454 marty.jones@sprouselaw.com

/s/ Jeff Hartsell
JEFF HARTSELL

APPENDIX

1953 Deed	TAB 1
Order Granting Temporary Injunction	TAB 2
Plaintiff's First Amended Original Petition and Application For Temporary Injunction	TAB 3
City of Lubbock's Original Answer	TAB 4
City of Lubbock's Request for Findings of Fact and Conclusions of Law	TAB 5
Defendant, City of Lubbock's, Supplemental Request for Documents to be Included in the Clerk's Record	TAB 6
Getty Oil Co. v. Jones	TAB 7
Landreth v. Melendez	TAB 8
Davis v. Devon Energy	TAB 9
Schmidt v. Richardson	TAB 10
Texas Rules of Civil Procedure 683	TAB 11

TAB #11953 Deed

L.A. Purtell, et ux

DEED

City of Lubbook

THE STATE OF TEXAS,

COUNTY OF BAILEY | KNOW ALL MEN BY THESE PRESENTS:

-

That we, L.A. PURTELL and wife, HAZEL PURTELL, of Lubbook County, Texas, for and inconsideration of the sum of Ten and no/100 (\$10.00) Dollars, cash and other valuable consideration, to us in hand paid by the CITY OF LUJBOCK, a municipal corporation of Lubbock County, Texas, HAVE GRANTED, SOLD AND CONVEYED, and by these presents do Grant, Sell and Convey unto the said CITY OF LUBBOCK, a municipal corporation of Lubbock County, Texas, all of the percolating and underground water in, under, and that may be produced from the hereinafter described tracts of land, situated in Beiley County, Texas, together with the exclusive right to take such water from said tracts of land and to use the same for disposition to cities and towns situated in Bailey, Cochran, Hockley, Lamb and Lubbock Counties, Texas, together with the full and exclusive rights of ingress and egress in, over, and on sid lands, so that the Grantee of said water rights may at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring producing, and getting access to percolating and underground water; together with the rights to string, lay, construct, and maintain water and fuel pipe lines and trunk, collector, and distribution water lines, power lines, communication lines, $_{ heta}$ ir vents with barricades, observation wells with the barricades, if required, not exceeding ten (10) square feet of surface area, reservoirs, booster stations, houses for employees, and access roads on, over and under said lands necessary or incidental to any of said operations, together with the rights to erect necessary housing for wells, equipment and supplies, together with perpetual easements for all such purposes, together with the rights to use all that part of said lands necessary or incidental to the taking of percolating and underground water and the production, treating and transmission of water therefrom and delivery of said water to the water system of the City of Lubbook only; subject to the rights reserved in JOHN L. BIRDWELL, and wife, CORDIE BIRDWELL; J.E. BIRDWELL and wife, GENENE BIRDWELL; BERNARD PHELPS and wife, ARLENE PHELPS; and W.R. BROWN and wife, JOHNNIE BROWN, their heirs and assigns, to such quantities of water as may be required to carry on usual and normal domestic and ranching operations and undertakings upon said lands, excluding irrigation, and such quantities of water as may be required for normal and customary operations for the production of oil and gas and other minerals from said lands, and by normal and customary operations for the production of oil and gas and other minerals is meant such operations as are now normal and customary in the ares where said land is located, and subject also to the exceptions and reservations hereinafter provided;

FIRST TRACT: All of League 173, Sutton County School land;

SECOND TRACT: All of League 174, Sutton County School land;

THIRD TRACT: Lesgue 172, Sutton County School Land, except Labors 3,4, and 25, thereof, and except also a certain 354 acre tract of land out of the Northeast (NE) corner of said League 172, being Labors 1 and 2 thereof, more particularly described as follows:

BEGINNING at a 1-1/4" pipe the Northeast corner of League No. 172, Sutton County School Land, Bailey County, Texas;

THENCE West 1900 varas to a 1/2" pipe set for a corner;
THENCE South 1051.4 varas to a 3/4" pipe set for a corner;
THENCE East 1900 varas to a 1/2" pipe set for a corner;

Second on file of the of



THENCE North 1051 a varas to the place of beginning and containing 354 acres of land;

FOURTH TRACT: All of what is known as the A.A. Kuehn Survey 2, Block "R", situated
in Beiley County, Texas;

FIFTH TRACT: Sections 5 to 11, both inclusive; 16 to 22, both inclusive; 27 to 33, both inclusive; 38 to 44, both inclusive; 49 to 55, both inclusive; 64 to 68, both inclusive; 77 to 79, both inclusive; 89 to 92, both inclusive, all situated in Block A, of the Melvin Blum & Blum Survey;

SIXTH TRACT: Sections 1 to 4, both inclusive of Block 0 of the T.H. Jones Survey; all of the above described land being situated in B, iley County, Texas.

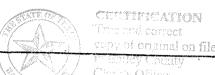
This conveyence is expressly made subject to the rights reserved by the respective Grantors, JOHN L. BIRDWELL and wife, CORDIE BIRDWELL; J.E. BIRDWELL and wife, GENENE BIRDWELL; BERNARD PHELPS and wife, ARLENE PHELPS; and W.R. BROWN and wife, JOHNNIE BROWN, in the exchange deed between such Grantors and LA.PURTELL, dated the 30th day of January, 1953, to which reference is here made for a more particular description of such reserved rights and of the property hereinabove described, and their respective heirs and assigns, to the right to drill and use water from one irrigation well for agricultural, irrigation purposes only, such wells to be equipped with one (1) pump having only one column pipe, which pipe shall not exceed ten (10") inches in diameter, to be located on each of the following described tracts of land, out of the land herein conveyed:

Sections Nos. 27, 28, 52, 53, 54, 55, 65, 66, the West 398.19 acres of Section 67, the East 258.31 acres of Section 67, Sec. 68, Sec. 77, all in Block A, Melvin Blum and Blum Survey, and Sections 1 and 3 in Block O, T.H. Jones Survey, and two such well sites and irrigation wells in Section 2, Block O. T.H. Jones Survey, for a total of Sixteen (16) irrigation wells that may be drilled, not more than one well to any one tract above named, except Section 2, Block O, on which two wells are permitted.

IT IS AGREED and understood that as to the land above described on which the right to irrigation wells are reserved and excepted by JOHN L. BIRDWELLend wife, CORDIE BIRDWELL; J.E. BIRDWELL and wife, GENENE BIRDWELL; BERNARD PHELPS and wife, ARLENE PHELPS; and W.R. BROWN and wife, JOHNNIE BROWN, neither they, nor their heirs or assigns nor the CITY OF LUBBOCK, Grantee herein, its successors and assigns, shall ever have any claim or cause of action against each other, or their heirs, successors and assigns, by reason of drainage of water from said lands or any part thereof.

It is understood that, for the purpose of this deed, water and minerals in water shall never be construed as minerals, but there is reserved and excepted unto the owners of any outstanding rights and interests in the oil, gas and other minerals, in, on, under said lands hereinabove described, such water as may be appurtenant thereto.

In accepting and recording this deed, the City of L,bbod; its successors and assigns, covenants and agrees to pay Three and no/100 (\$3.00) Dollars per acre per year for all ground surface occupied by housing facilities, fenced enclosures and roads constructed and used by it and to pay for damages to any surface property proximately caused by any operations or activities on said land by the City of Lubbock, its agents and employees, for which no payment is otherwise provided herein, and shall, within a reasonable time after conducting any operations on said land, remove therefrom any trash, debris and other material or objects which clutter up or detract from the usefulness of said lands to the owners thereof. Where the City of Lubbock, its successors and assigns, constructs new roads through an outside fence, the City of Lubbock shall install and maintain in such opening, gates of durable construction; or, at the option and request of the owner of the land, the City of Lubbock will install and maintain cattle guards. Where the City of Lubbock, its successors and assigns, constructs and uses roads across inside fences, the said City of Lubbock will install and



Clerk's Office page 2 of 4

maintain cattle guards; it being understood that locking gates on the outside fence shall not effect the right of entry, ingress and egress of authorized officers, employees, and contractors of the City of L_{U} bbock engaged in the business of the City of L_{ij} block pertaining to the full enjoyment of water rights herein ω nveyed.

It is expressly understood and agreed that no city water well shall be drilled by the City of Lubbock, its successors or assigns, within one-fourth (1/4th) mile of any of the presently existing windmill wells, the locations of which are described in Exhibit "A", which is attached hereto and made a part hereof.

It being the intention of this deed to grant, sell and convey unto the CITY OF LUBBOCK, its successors and assigns, the percolating and underground water in and under and that may be produced from the tracts of land hereinabove described, with the rights incident thereto and this deed is being made and delivered by the Grantors and accepted by the Grantee with the distinct understanding that this conveyance does not cover the surface of said property nor any interest in and to any of the oil, gas or other minerals in and under or that may be produced from the said land, and the same is excepted from this conveyance, and the Grantors reserve unto themselves, their heirs and assigns, all of the surface and surface rights, not herein expressly conveyed, and all of the oil, gas and other minerals in and under and that may be produced from the herein conveyed property, which have not been heretofore conveyed or reserved.

TO HAVE AND TO HOLD the above described premises, together with all and singular, the rights and appurtenances thereto in anywise belonging unto the said CITY OF LUBBOCK, a municipal corporation of Lybbock County, Texas, its successors and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to Warrant and Forever Defend all and singular the said premises unto the said CITY OF LUBBOCK, a municipal corporation of Lubbock County, Texas, its successors and assigns, against every person whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS our hands this 30th day of January, 1953.

\$498.30 IRS Attached and Cancelled

L.A. PURTET.T.

HAZEL PURTELL

THE STATE OF TEXAS, COUNTY OF LUBBOCK

BEFORE ME, the undersigned authority, on this day personally appeared LA.PURTELL and HAZEL PURTELL, his wife, both known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they each executed the same for the purposes and consideration therein expressed, and the said HAZGL PURTELL wife of the said L.A. PURTELL, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said HAZEL PURTELL acknowledged such instrument to be her act and deed, and she declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 30th day of January, 1953.

Thos. B. Duggan, Jr.

Notary Public in and for Lubbock County,

EXHIBIT "A"

Existing windmills are located as follows, to-wit:A POINT 800 east and 3000 south, more or less, from the NW corner of Section 9, Block A, Bailey County, Texas. A POINT 1200' E. and 1700' N., more or less, from the SW corner of Saction 11, Block A.

(Seal)

Bailey County, Texas. A POINT 500'S. and 2600'W., more or less, from the NEcorner of Section 16, Block A, Beiley County, Texas. A POINT 2300' S. and 800' W., more or less, from the NE corner of Sction 18, Block A, Bailey County, Texas. A POINT 100 E. and 400' N., more or less, from the SW corner of Sction 21, Block A, Bailey County, Texas. A POINT 300' E. and 1500' S., more or less, from the NW corner of Section 28, Block A, Bailey County, Texas. A POINT 900' E. and 1800' N., more or less, from the SW corner of Section 30, Block A, Beiley County, Texas. A POINT 600' W. and 3000' N., more or less, from the SE corner of Section 2, Block O, Bailey County, Texas. A POINT 1800' S. and 2500' W., more or less, from the NE corner of Section 38, Block A, Bailey County, Texas. A POINT 200' E. and 300' N., more or less, from the SW corner of Section 43, Block A, Bailey County, Texas. A POINT 2200' N. and 400' W., more or less, from the SE corner of Section 50, Block A, Bailey County, Texas. A POINT 500' E. and 500' N., more or less, from the SW corner of Section 55, Block A, Bailey County, Texas. A POINT 500' E. and 1400' N., more or less, from the SW corner of Section 3, Block O, Bailey County, Texas. A POINT 200' W. and 300' N., more or less, from the SE corner of Section 68, Block A, Bailey County, Texas. A POINT 1500' N. and 2300' W., more or less, fom the SE corner of Section 77, BlockA, Bailey County, Texas. A POINT 2000' W. and 900' N., more or less, from the SE corner of Section 79, Block A, Beiley County, Texas. A POINT 1200' N. and 1600' W., more or less, from the SE corner of Section 89, BlockA, Bailey County, Texas. A POINT 600' E. and 600' S., more or less, from the NW corner of Survey 172, Sutton County School Land, Bailey County, Texas. A POINT 1000' W. and 25001 N., more or less, from the SE corner of Survey 172, Sutton County School Land Bailey County, Texas. A POINT 3000' E., and 900' S., more or less, from the NW corner of Survey 173, of the Sutton County School Land, Bailey County, Texas. A POINT 4500' E./ N., more or less, from the SW corner of Survey 173, Sutton County School Land, Bailey County, Texas. A POINT 3500' E. and 1500' S., more or less, from the NW corner of Survey 174, Sutton County School Land, Bailey County, Texas. A POINT 6500' W. and 6500' N., more or less, from the SE corner of Survey 174, Sutton County School Lend, Bailey County, Texas. A POINT 3000' W. and 4100' N., more or less, from the SE corner of Survey 174, Sutton County School Land , Bailey County, Texas. FILED FOR RECORD JANUARY 30th, 1953, at 4:45 P.M., RECORDED FEBRUARY 3rd, 1953, at 11:00 A.M., Volume 59, Pages 165-168, Deed Records of Bailey County, Texas.

By Deroth Zuner Deputy -----

M.G.Bass, County Clerk Beiley County, Texas

Julian E. Lanau, et ux THE STATE OF TEXAS,

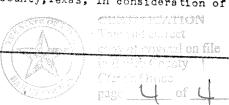
RIJHT-OF-WAY DEED

Bailey County, Texas.

COUNTY OF BAILEY KNOW ALL MEN BY THESE PRESENTS:

That Julian E. Lenau & wife Lois Koen Lenau, of the County of Bailey, State of Texas for and in consideration of the sum of $O_{\rm n}e$ and no/100 Dollars to us in hand paid by Bailey County, Texas, receipt of which is hereby acknowledged and confessed, have GRANTED SOLD and CONVEYED, and do by these presents GRANT, SELL and CONVEY unto the Bailey County, Texas, the free and uninterrupted use, liberty and priviledge of passage, in, slong & upon & scross the following described tract or parcel of land situated in Bailey County, Texas, and being more particularly described as follows: beginning at a point 40 West of the Northeast corner of Section No. 6, Block *F*, Bailey County, Texes; Thence South 15 feet to a point; Thence West 3387.7 feet to a point; Thence North 15 feet to a point; Thence East 3387.7 feet to the place of beginning.

And it is further agreed that the said Bailey County, Texas, in consideration of the



TAB #2

Order Granting Temporary Injunction

Cause No. 9245

COYOTE LAKE RANCH, LLC	§	IN THE 287th DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	IN AND FOR
	§	
THE CITY OF LUBBOCK, TEXAS	§	
	§	
Defendant.	§	BAILEY COUNTY, TEXAS

ORDER GRANTING TEMPORARY INJUNCTION

This case is before the Court on motion of the Plaintiff, Coyote Lake Ranch, LLC (the "Ranch") for the issuance of a temporary injunction against Defendant enjoining it from taking certain actions regarding a certain well field plan affecting the Ranch during the pendency of this cause. The Court previously issued a temporary restraining order on November 13, 2013, granting such relief for a period of 14 days. Defendants were given notice of the temporary injunction hearing and represented at the hearing by their counsel of record. The Ranch seeks the injunction based on its First Amended Original Petition and Application for Temporary Restraining Order, which was supported by the affidavit of G. Hughes Abell. All parties appeared and offered additional evidence and arguments for the Court's consideration.

On considering the evidence received and the arguments of counsel, the Court finds and concludes that the Ranch will probably prevail on the trial of this cause; that pursuit of Defendant's well field plan has caused damage to the Ranch, and further damage to the Ranch will occur absent the use of reasonable means to ameliorate that damage; that Defendant's proposed well field plan is likely accomplished through reasonable alternative means that do not unreasonably interfere with the Ranch's current uses; and that the Ranch has suffered harm caused by Defendant's activities and will likely suffer irreparable harm in the future.

FILED 3.48
a.m./p.m.
District Court, Beiley County, Texas
Elaine Parker, District Clerk

White Norm Departs

The Court also finds and concludes that if Defendant carries out their intentions regarding the well field project, it will thereby alter the status quo and tend to make ineffectual a judgment in favor of the Ranch in that the Ranch will suffer harm and will probably be irreparably damaged thereby. Unless the Defendant is deterred and prevented from carrying out its intentions, the Ranch will be without adequate remedy at law because monetary relief would be inadequate to make the Ranch whole.

IT IS, THEREFORE, ORDERED that Defendant, its officers, agents, servants, employees, attorneys, and those persons who are in active concert or participation with it who receive actual notice of this temporary injunction by personal service or otherwise are hereby enjoined and prohibited from taking any of the following actions during the pendency of this cause.

- a. Mowing, blading, or otherwise destroying the growing grass on the surface of the Ranch;
- b. Proceeding with any test hole drilling or water well drilling without consulting plaintiff regarding potential impacts to the surface of the Ranch;
- c. Erecting power lines to proposed well fields on the Ranch.

IT IS FURTHER ORDERED that upon the filing of this Temporary Injunction Order, the Temporary Restraining Order entered on November 13, 2013 shall expire in all respects.

IT IS FURTHER ORDERED that the Cash Deposit in Lieu of Bond in the amount of \$10,000.00 made by the Ranch as security for the temporary restraining order shall continue and serve as security for this temporary injunction.

IT IS FURTHER ORDERED that trial on the merits of this cause is hereby set for trial beginning on November 12, 2014. The parties are directed to consult with each other and tender a corresponding agreed scheduling order for consideration by the Court.

IT IS FURTHER ORDERED that the clerk shall forthwith issue a temporary injunction in conformity with the law and the terms of this order.

SIGNED and ISSUED on December 23, 2013.

LIDGE PRESIDING

TAB #3

Plaintiff's First Amended Original Petition and Application for Temporary Restraining Order

Cause No. 9245

COYOTE LAKE RANCH, LLC	§	IN THE 287 th DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	IN AND FOR
	§	
THE CITY OF LUBBOCK, TEXAS	§	
	§	
Defendant.	§	BAILEY COUNTY, TEXAS

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER

COMES NOW, Coyote Lake Ranch, LLC, Plaintiff herein ("Plaintiff"), and file their Original Petition complaining of Defendant, the City of Lubbock, Texas ("Lubbock"), and would respectfully show the Court as follows:

I. <u>Discovery Control Plan</u>

1. Plaintiff pleads that discovery should be conducted in accordance with the Level 3 Discovery Control Plan under Texas Rule of Civil Procedure 190.4.

II. PARTIES

- 2. Plaintiff is a limited liability corporation formed under the law of the State of Texas.
- Lubbock is a home rule municipal corporation duly formed pursuant to the laws of the State of Texas and may be served with citation by service upon its Mayor, Glen Robertson, at 1625 13th Street, Lubbock, Texas and by service upon the City Secretary, Becky Garza, at 1625 13th Street, Lubbock, Texas.
- 4. Pursuant to Tex. Gov. Code § 271.152, Lubbock has waived any claim of sovereign immunity with respect to this suit because it arises out of a binding contract between Lubbock and Plaintiff.



III. JURISDICTION AND VENUE

- 5. The Court has jurisdiction over this suit because the amount in controversy is in excess of the jurisdictional minimums of this court.
- 6. Venue is mandatory in Bailey County, Texas pursuant to Tex. Civ. Prac. & Rem. Code § 15.011 in that the controversy is one for recovery of damages to real property. Plaintiffs recognize that the City of Lubbock is a municipality covered under the mandatory venue provision Tex. Civ. Prac. & Rem. Code § 15.0151(b), and that according to that provision venue is mandatory in Lubbock County, Texas. When two mandatory venue provisions conflict, both venues are considered proper and the Plaintiff may make an election as to which county to file suit in. see Marshall v. Mahaffey, 974 S.W.2d 942, 950 (Tex. App.—Beaumont 1998, pet. Denied). Accordingly, Plaintiff elects to pursue this action in Bailey County, Texas.

III. FACTUAL BACKGROUND

- 7. Plaintiff is the owner of a ranch in Bailey County, Texas locally known as the Coyote Lake Ranch. The ranch consists of approximately 26,600 acres and is used primarily for cattle ranching and hunting.
- 8. On January 30, 1953, Plaintiff's predecessor in title executed an instrument reporting to convey some but not all of the groundwater rights under the ranch to the City of Lubbock. A copy of the conveyance in question is attached as Exhibit 1 to the Affidavit of G. Hughes Abell, which affidavit was attached to Plaintiff's Original Petition and Application for Temporary Restraining Order, which is incorporated herein by reference.
- 9. Acting pursuant to these documents, the City of Lubbock over the ensuing 70 years developed a small well field on the extreme northern border of the ranch.

10. Although the conveyance obligate Lubbock to pay for surface use for all roads and well sites developed by Lubbock, Lubbock has failed over the course of the contract to make such payments, thereby evidencing its disregard for the contractual terms.

11. After the original conveyance of water rights, a groundwater conservation district, specifically the High Plains Ground Water Conservation District, was formed by the State of Texas and given jurisdiction over the area that includes Plaintiff's ranch. The formation of the groundwater conservation district was neither anticipated nor expected at the time of the 1953 conveyances.

12. The ranch consists primarily of extremely sandy soils, some of which soils bear grass and some of which soils are manifested in sand dunes. Because of the extremely sandy nature of the surface of the ranch, disruptions of that surface can and do lead to "blow-outs" where prevailing winds cause sand to become airborne and to become destructive. Such "blow-outs" destroy grass and pile sand into additional dune like areas. The prospect of such blowing sand is destructive to the utilization of the property as a ranch. Further, the fact and results of blowing sand cause a diminution in the market value of the property. In fact, the mere publication of a Master Plan showing the development at issue will diminish the market value of the property.

13. Beginning in 2012, Defendant began publicly discussing a plan to construct additional wells, roads, pipelines and power lines on and over the surface of the ranch. Although Defendant initially described the construction of additional 20 wells, Defendant has subsequently disclosed a "Master Plan" depicting the construction of an additional 80 wells. A copy of the "Master Plan" showing the proposed wells in relation to existing structures is attached to the Affidavit of G. Hughes Abell as Exhibit 2. Although the original conveyance document states

that Defendant may not place water wells within ¼ mile of existing windmills, the maps provided by Defendant show that at least two of the planned wells fall within an area less than ¼ mile from existing windmills. The presence of wells within ¼ mile of these existing windmills will amount to a breach of contract and will cause unreasonable drainage of groundwater from the formation from which such windmills derive water.

- 14. Recently, Defendant has entered upon the ranch property and has damaged the sandy surface by mowing a path through the ranch for test well equipment. Photographs of damage caused by such mowing are attached to the Affidavit of G. Hughes Abell as Exhibits 3 and 4. Defendant did not obtain Plaintiff's approval of the methodology of such mowing. Further, Plaintiff was not consulted regarding points of ingress and egress. More importantly Plaintiff was not notified and given an opportunity to determine how best to approach drilling test wells without harming the delicate environment of the ranch.
- 15. The City has demonstrated a disregard for the environment of the ranch. For example, in attempting to build and maintain roads between existing wells, Lubbock utilized for road surfacing a glittering substance to locally known as "Black Beauty" obtained as waste residue from its nearby coal burning electric power plant. Plaintiff has employed an engineering firm to do testing with respect to this substance, and has determined that the substance contains arsenic and other undesirable toxins. Written complaint was registered with the City and it crudely removes some, but not all, of the material. The continuing presence of such substance on ranch roads damages the surface and endangers the livestock and other wildlife on the ranch, due to the toxins which are carried from road surfaces; mostly in the form of dust as the road material is pulverized by municipal maintenance traffic, and settling on surrounding grass.

IV.

CAUSES OF ACTION

A. Taking Without Compensation

- 16. The factual allegations preceding paragraphs are incorporated hereinafter by reference.
- 17. Defendant damaged the market value of the ranch in that it has diminished the property's usefulness for ranching purposes. In so doing, Defendant has failed to indicate the necessity for its planned use of the ranch. According to Defendant's publicly circulated statements, it does not have a need for the groundwater under the ranch because Lake Alan Henry will provide the City of Lubbock's water needs. Further, the Defendant has failed to demonstrate that its proposed use of the ranch is the least damaging and least intrusive utilization of the surface. Finally, the Defendant has failed and refused to compensate Plaintiff adequately for the loss of market value of the ranch.
- 18. Defendant is a governmental entity. The total or partial taking of value of the ranch is done under color of state law, and such taking amounts to a violation of Plaintiff's rights under the 5th Amendment of the United States Constitution and Article 1 Section 17 of the Texas Constitution.

B. Breach of Contract

- 19. The factual allegations preceding paragraphs are incorporated hereinafter by reference.
- 20. Defendant has a contractual and common law responsibility to use only that amount of surface that is reasonably necessary to its operations. Further, Defendant has a duty to conduct its operations with due regard for the rights of the surface owner.

- 21. Defendant has previously engaged in certain activities in preparation for drilling test wells on the property. In doing so, Defendant has breached its contractual duty by using more surface that was reasonably necessary for such operations. Such use has harmed the surface of the ranch. Further, Defendant has failed to conduct its operations with due regard for the rights of the surface owner. Defendant's operations to date, and Defendant's planned operations, will materially interfere with Plaintiff's use of the ranch as a cattle ranch.
- 22. Defendant has breached the contract represented by the January 30, 1953 conveyance by failing to pay for ground surface occupied by certain facilities, and by failing to pay for surface property damages proximately caused by operations or activities on the ranch by the City of Lubbock.
- 23. Defendant is further in breach of the contract represented by the January 30, 1953 conveyance by planning or placing groundwater wells within ¼ mile of windmill wells that existed at the time of the conveyance and that exist today.
- 24. There exist reasonable alternatives to the methods and means employed by Defendant, which alternatives would preserve the fragile surface of the ranch without unreasonably hindering Defendant's planned operations.
- 25. Defendant's breaches of contract as noted above have caused damages to Plaintiff in amounts in excess of the jurisdictional minimum of this Court.
- Plaintiff is entitled to recover all attorneys fees expended as a result of Defendant's breaches of contract.

C. Negligence

27. Plaintiff incorporates by reference the factual allegations set forth above.

28. Defendant has conducted certain operations on the property in question in preparation for drilling test wells. In conducting its initial operations, Defendant has negligently caused damage to the fragile surface of the ranch by excessively mowing such surface, causing actual and probable wind erosion.

D. Declaratory Judgment

- 29. Pursuant to Tex. Civ. Prac. & Rem. Code § 36, Plaintiff brings this action for declaratory judgment, requesting that the Court construe the agreements and relationship between the parties and declare the rights of the parties under the various written instruments. In that regard, Plaintiff shows that a present and justiciable dispute exists between the parties, and that a declaration of the rights of the parties would help solve and resolve some of those disputes. Without limiting the foregoing, Plaintiff requests that the Court declare that under the contracts between the parties:
 - a. Defendant may not drill test holes or water wells within ¼ mile of any existing windmills on the ranch;
 - b. Defendant may not unreasonably disrupt the surface of the ranch;
 - c. Defendant must employ reasonable methods and means of operation that preserve the use and value of the ranch; and
 - d. Defendant may not utilize groundwater from the ranch in derogation of the groundwater rights reserved to Plaintiff.
 - e. In the alternative to these declarations, Plaintiff seeks a declaration that the contracts are void, for failure of the City of Lubbock to comply with their terms, and on the basis of changed technological and regulatory conditions rendering impractical the original intent of the parties.

E. Application for Temporary Restraining Order

- 30. Defendant has already entered upon the surface of the property to drill test holes for its planned well field development. In doing so, Defendant has damaged the property by mowing grass otherwise set aside for grazing of cattle and for habitat for wildlife. Unless immediately enjoined from doing so, Defendant has evidenced its intent to continue mowing Plaintiff's surface, thereby causing further disruption of the sand and further damage and disruption to cattle livestock grazing resources and wildlife resources.
- 31. Plaintiff prays that this court enter a temporary restraining order preventing Defendant from any further activities on the surface until such time as a hearing can be held on an application for temporary injunction. Plaintiff further prays that upon such hearing on application for temporary injunction, the Courter enter a temporary injunction prohibiting Defendant from:
 - a. Mowing, blading or otherwise destroying the growing grass on the surface of the ranch;
 - b. Drilling test holes within ¼ mile of existing windmills;
 - c. Proceeding with any test hole drilling or water well drilling without consulting with Plaintiff regarding potential impacts on the surface of the ranch.

PRAYER

WHEREFORE, Coyote Lake Ranch, L.L.C. prays that the Defendants be cited to appear and answer and, that upon final trial that Coyote Lake Ranch, L.L.C. be adjudge to recover the following from the Defendants:

- a. A temporary injunction;
- b. Actual and Economic Damages for a Taking without Compensation;
- c. Declaratory relief as outlined above;

- d. Pre-judgment interest; and
- e. Postjudgment interest.

Respectfully submitted, SPROUSE SHRADER SMITH, P.C. 701 S. Taylor, Suite 500 P.O. Box 15008 Amarillo, Texas 79105-5008

Tel: (806) 468-3300 Fax: (806) 373-3454

By:

Marvin W. Jones

Texas Bar No. 10929100

C. Brantley Jones

Texas Bar No. 24079808

Attorneys for Coyote Lake Ranch, L.L.C.

CERTIFICATE OF CONFERENCE

This is to certify that a true and correct coy of the above and foregoing document was sent to the following as signified below on this the 26th day of November, 2013.

Jeff Hartsell
THE CITY OF LUBBOCK, TEXAS
1625 13th Street
Lubbock, Texas 79457 *Via Hand Delivery*

Marvin W. Jones

761986_I - 6937.01

TAB #4

City of Lubbock's Original Answer

Cause No. 9245

COYOTE LAKE RANCH, LLC Plaintiff,	§ §	IN THE 287 TH DISTRICT COURT
V.	§ § §	IN AND FOR
THE CITY OF LUBBOCK, TEXAS Defendant.	§ §	BAILEY COUNTY, TEXAS

CITY OF LUBBOCK'S ORIGINAL ANSWER

COMES NOW, CITY OF LUBBOCK, Defendant in the above-entitled and numbered cause, and files this Original Answer to Plaintiff's Original Petition and Application for Temporary Restraining Order (Petition) and in support thereof would respectfully show the Court as follows:

I. GENERAL DENIAL

This Defendant denies each and every allegation made in Plaintiff's Petition and demands strict proof thereof.

II. VERIFIED DENIAL

The Plaintiff did not timely present its notice of claim within six (6) months as required by the City of Lubbock's Charter, Chapter 1, Article II. Section 8. As such, the City is exempt from liability. Attached to this Answer is a copy of the City's Charter provision, Exhibit "1", and the Affidavit of Rebecca Garza, Exhibit "2", verifying that no claim has been filed by the Plaintiff.

District Court, Bailey County, Texas Elaine Parker, District Clerk

CITY OF LUBBOCK'S ORIGINAL ANSWER

Page 1

III. AFFIRMATIVE DEFENSES

A.

City owns the Underground Water and has the Right to Enter Property To Produce and Explore for such Water

This Defendant affirmatively asserts that Plaintiff is not entitled to an injunction against the City of Lubbock as the City of Lubbock owns the water rights and purchased such water rights in 1953 as shown in Exhibit 1 attached to Plaintiff's Petition. This conveyance granted to the City the rights to the water and to access the property to drill for such water. The conveyance states in part that the City is granted:

[a]ll of the percolating and underground water in, under, and that may be produced from the hereinafter described tracts of land situated in Bailey County, Texas...together with the full and exclusive rights of ingress and egress in, over, and on said lands, so that the Grantee of said water rights may at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring, producing, and getting access to percolating and underground water...

B. City has the Right to Erect any Infrastructure Necessary For the Production and Transport of Water

The City not only owns the water and has the rights given to go on the land to drill and search for water, but it is also granted the ability to erect all of the infrastructure necessary to transport the water. The 1953 Agreement states that the City has the right to:

..lay, construct, and maintain water and fuel pipe lines and trunk, collector, and distribution water lines, power lines, communication lines, air vents with barricades, observation wells with the barricades...reservoirs, booster stations, houses for employees, and access roads on, over and under said lands necessary or incidental to any of said operations, together with the rights to erect necessary housing for wells, equipment and supplies, together with perpetual easements for all such purposes, together with the rights to use all that part of said lands necessary or incidental to the taking of percolating and underground water and the production, treating and transmission of water therefrom and delivery of said water to the water system of the City of Lubbock...

Pursuant to the 1953 Agreement provided to the Court in Plaintiff's Exhibit "1", attached to its Petition, the City owns the rights to the water and also has the rights to drill for the water and

construct any infrastructure necessary to its production and transportation. Plaintiff is not entitled to an injunction preventing the City from exercising its contractual rights to drill and search for water and is not entitled to an injunction preventing the City from erecting or developing the infrastructure necessary to its water operations.

C.

City's Immunity has not been Waived for Breach of Contract

The City also affirmatively asserts that Plaintiff has not shown a probable right of recovery nor asserted a cause of action against the City of Lubbock for breach of contract as the City's immunity from suit has not been waived pursuant to Section 271.151 et. seq. of the Local Government Code.

D.

Plaintiff has not Filed Claim as Required by the Charter of the City of Lubbock

The City also affirmatively asserts that Notice has not been properly given to the City pursuant to its City Charter for breach of contract. Chapter 1, Article II, Section 8 of the Lubbock City Charter states that:

The City shall not be liable on account of any claim for specific performance, breach of contract or damages to the person or to any property, or for any character of tort, unless the person asserting such claim shall be given the City written notice of such claim and of the facts upon which it is based within six (6) months from the time it is claimed such cause of action arose, and no such suit shall be instituted or maintained on any such claim until the expiration of ninety (90) days from the time such notice shall have been given. (See the attached certified copy of the City of Lubbock City Charter provision attached as Exhibit "1").

Plaintiff has not filed such written claim. (See the Affidavit of Rebecca Garza attached as Exhibit "2").

E.

City Asserts Four (4) year Limitations for Breach of Contract

The City also affirmatively asserts the statute of limitations for any cause of action for breach of contract.

F. No Claim for Inverse Condemnation Since Contract Consents to the City's Activities

The City affirmatively asserts that Plaintiff cannot assert a claim for inverse condemnation as Plaintiff is asserting a taking for activities that are actually consented to and provided for in the contract. The contract provides for payment of \$3.00 per acre per year for the City's erecting housing facilities, fenced enclosures and roads used by it and the contract also provides for payment to the property owner for any damage to the surface of the property caused by operations. Plaintiff cannot claim inverse condemnation for activities that have been consented to by contract with the property owner.

G. City Asserts Limitations as to Inverse Condemnation

The City also affirmatively asserts the limitations as to any cause of action for inverse condemnation.

H. Windmills Existing in 1953

Lastly, the City affirmatively asserts that it has no intention of drilling any well within $\frac{1}{4}$ mile of any windmill that existed in 1953.

PRAYER

WHERFORE, premises considered, this Defendant prays that Plaintiff take nothing by its suit against the City of Lubbock, that the application for Temporary Injunction be denied, that

the \$10,000 bond be forfeited in favor of the City of Lubbock, that Plaintiff's Petition be dismissed, for attorneys fees and for such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

SAM MEDINA CITY ATTORNEY State Bar No. 13895500 JEFF HARTSELL TRIAL ATTORNEY State Bar No. 09170275 P O Box 2000 Lubbock, Texas 79457 806-775-2222 Facsimile 806-775-3307

JEFF HARTSELL State Bar No. 0917075

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing document was hand delivered on the Holember, 2013, by U. S. Mail to the following:

Marvin W. Jones C. Brantley Jones Sprouse Shrader Smith, P.C. P O Box 15008 Amarillo, Texas 79105-5008

JEFF HARTSELL

CityAtty/Litigation/City Defendant/Coyote Ranch/Pleadings/COL's Original Answer

CITY OF LUBBOCK §
COUNTY OF LUBBOCK §
STATE OF TEXAS §

CERTIFICATE TO COPY OF PUBLIC RECORD

I hereby certify, in the performance of the functions of my office, that the attached instrument is a full, true and correct copy of Chapter 1, Article 2, Section 8, of the Code of Ordinances of the City of Lubbock, as the same appears of record in my office and that said document is an official record from the public office of the City Secretary of the City of Lubbock, Lubbock County, State of Texas, and is kept in said office.

I further certify that I am the City Secretary of the City of Lubbock, that I have legal custody of said record, and that I am a lawful possessor and keeper and have legal custody of the records in said office.

In witness whereof I have hereunto set my hand and affixed the official seal of said office this 21st day of November, 2013.

(City Seal)

Rebedca Garza City Secretary City of Lubbock

Lubbock County, State of Texas



ARTICLE II. [GENERAL POWERS]

Sec. 8. Exemption from liability for damages.

The City shall not be liable on account of any claim for specific performance, breach of contract or damages to the person or to any property, or for any character of tort, unless the person asserting such claim shall give the City written notice of such claim and of the facts upon which it is based within six (6) months from the time it is claimed such cause of action arose, and no such suit shall be instituted or maintained on any such claim until the expiration of ninety (90) days from the time such notice shall have been given. (Amended 4/1/1930; 5/7/1988)

Case law annotations—Minor was excused from the notice requirement in section 8, above. Lubbock v. Onley, 498 S.W. 2d 429 (1973). Section 8 does not apply to damages for breach of contract. Geo. L. Simpson & Co. v. Lubbock, 17 S.W. 2d 163 (1928).

Cause No. 9245

COYOTE LAKE RANCH, LLC Plaintiff,	§	IN THE 287 TH DISTRICT COURT
V.	§ § §	IN AND FOR
THE CITY OF LUBBOCK, TEXAS Defendant.	§ §	BAILEY COUNTY, TEXAS

AFFIDAVIT OF REBECCA GARZA

STATE OF TEXAS	ξ
COUNTY OF LUBBOCK	<u> </u>

BEFORE ME on this 21st day of November 2013, personally appeared Rebecca Garza, who after being duly sworn, upon her oath states:

I.

My name is Rebecca Garza and I am the City Secretary for the City of Lubbock. I am over the age of eighteen (18) years, am of sound mind, have never been convicted of a crime that would preclude me from making this Affidavit, and all the facts stated herein are within my personal knowledge and are true and correct.

II.

The City Secretary's Office for the City of Lubbock is the designated department that receives claims from claimants. It is the policy of the City that if such claims are received by another office they will be forwarded to the City Secretary's Office.

We have searched our claim files back through 2006 and searched for claims from or involving Coyote Lake Ranch, LLC, G. Hughes Abell, Llano Partners, Ltd., Birdwell, and Bailey County and found no claims from or involving any of the aforementioned.

FURTHER, AFFIANT SAYETH NAUGHT.

Signed and dated at Lubbock, Lubbock County, Texas, on November 21, 2013

REBECCA GARZA

EXHIBIT 2

SUBSCRIBED AND SWORN TO BEFORE ME on this 21st day of November,



Notary Public in and for the State of Texas My Commission Expires: 4|3|2017

TAB #5

City of Lubbock's Request for Findings of Fact and Conclusions of Law

Cause No. 9245

COYOTE LAKE RANCH, LLC	§	IN THE 287 TH DISTRICT COURT
Plaintiff,	§	
	§	
V.	§	IN AND FOR
	§	
THE CITY OF LUBBOCK, TEXAS	§	
Defendant.	§	BAILEY COUNTY, TEXAS

CITY OF LUBBOCK'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

Court,

Bailey Lou

Defendant, CITY OF LUBBOCK, TEXAS, asks the Court to file findings of fact and conclusions of law.

A. Introduction

- 1. Plaintiff is COYOTE LAKE RANCH, LLC; Defendant is the CITY OF LUBBOCK.
- 2. The Court signed an Order Granting Temporary Injunction on December 23, 2013.

B. Request

- 3. Defendant ask the Court to file findings of fact and conclusions of law and require the clerk to mail copies to all parties, as required by Tex.R.Civ.P. 297.
- 4. Plaintiffs file this request within 20 days of the date the Court signed the Order Granting Temporary Injunction.

Respectfully submitted,

SAM MEDINA CITY ATTORNEY State Bar No. 13895500 JEFF HARTSELL TRIAL ATTORNEY State Bar No. 09170275 P O Box 2000

Lubbock, Texas 79457 806-775-2222

Facsimile 806-775-3307

JEEF HARTSELL

State Bar No. 0917075

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing document was mailed, certified mail return receipt requested on the that day of the day of the state of the

Marvin W. Jones C. Brantley Jones Sprouse Shrader Smith, P.C. P O Box 15008 Amarillo, Texas 79105-5008

DEFT HARTSELL

TAB #6

Defendant, City of Lubbock's, Supplemental Request for Documents to be Included in the Clerk's Record

Cause No. 9245

COYOTE LAKE RANCH, LLC Plaintiff,	§ §	IN THE 287 TH DISTRICT COURT
V.	\$ \$ 8	IN AND FOR IAN 1 7 2014
THE CITY OF LUBBOCK, TEXAS Defendant.	\$ \$	CITY ATTORNE) BAILEY COUNTY, TEXAS

DEFENDANT, CITY OF LUBBOCK'S, SUPPLEMENTAL REQUEST FOR DOCUMENTS TO BE INCLUDED IN THE CLERK'S RECORD

TO:

Elaine Parker

Bailey County District Clerk

300 S 1st Street

Muleshoe, Texas 79347

FROM:

Jeff Hartsell

Attorney for City of Lubbock

RE:

City of Lubbock's Supplemental Request for Documents to be included in

the Clerk's Record for the above-cited and referenced case

Defendant, CITY OF LUBBOCK, filed its request for documents to be included in the clerk's record on January 8, 2014. In addition to the documents it requested on January 8, 2014, request the following documents also be included in the Clerk's Record:

- City of Lubbock's Request for Findings of Fact and Conclusions of Law, filed on January 8, 2014; and
- The Court's Findings of Fact and Conclusions of Law when such are filed by the Court.

FILED 10:53 a.m./p.m.

District Court, Bailey County, Texas

Elaine Parker, District Clerk

Respectfully submitted,

CITY OF LUBBOCK, TEXAS

SAM MEDINA CITY ATTORNEY STATE BAR NO. 13895500

JEFF HARTSELL ASSISTANT CITY ATTORNEY STATE BAR NO. 09170275

P.O. Box 2000

Lubbock, Texas 79457

Telephone: (806) 775-2222 Facsimile: (806) 775-3307

By: 1

ATTORNEY FOR CITY OF LUBBOCK

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the above and foregoing **DEFENDANT**, **CITY OF LUBBOCK'S SUPPLEMENTAL REQUEST FOR DOCUMENTS TO BE INCLUDED IN THE CLERK'S RECORD** has been mailed by United States Mail, postpaid, certified, return receipt requested to Plaintiffs, by and through their attorney of record, Marvin W. Jones, Sprouse Shrader Smith, P.C., P O Box 15008, Amarillo, Texas 79105-5008, this 10th day of January, 2014.

JEFF WARTSELL

TAB #7

Getty Oil v. Jones

Westlaw.

470 S.W.2d 618, 53 A.L.R.3d 1 (Cite as: 470 S.W.2d 618)

Page 1

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Supreme Court of Texas. **GETTY OIL** COMPANY, Petitioner,

John H. **JONES**, Respondent.

No. B—2391. May 26, 1971. Rehearing Denied July 28, 1971. Second Rehearing Denied Oct. 6, 1971.

Surface owner brought action to restrain oil and gas lessee from using vertical space for pumping units that prevented use of an automatic irrigation sprinkler system. The District Court, No. 106, Gaines County, Truett Smith, J., granted lessee's motion for verdict non obstante veredicto and the owner appealed. The San Antonio Court of Civil Appeals, Fourth Supreme Judicial District, Barrow, J., 458 S.W.2d 93, reversed and remanded and both parties brought error. The Supreme Court, Steakley, J., held that lessee did not have right to the exclusive use of superadjacent air space above the limited surface area occupied by its pumping units; lessee's use of vertical superadjacent air space as well as lateral surface and subsurface of land was restricted to that which was reasonably necessary.

Affirmed.

McGee, J., dissented and filed opinion in which Pope, J., joined.

Greenhill, J., concurred on motion for rehearing and filed opinion and McGee, J., dissented.

West Headnotes

[1] Mines and Minerals 260 \$\iint\$73.1(6)

260 Mines and Minerals 260II Title, Conveyances, and Contracts 260II(C) Leases, Licenses, and Contracts 260II(C)3 Construction and Operation of Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

Oil and gas lessee did not have right to the exclusive use of superadjacent air space above the limited surface area occupied by its pumping units; lessee's use of vertical superadjacent air space as well as lateral surface and subsurface of land was restricted to that which was reasonably necessary.

[2] Mines and Minerals 260 \$\iint\$73.1(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

Oil and gas estate is dominant over surface estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove minerals is impliedly authorized by lease; but rights implied in favor of mineral estate are to be exercised with due regard for rights of owner of the servient estate.

[3] Mines and Minerals 260 € 73.1(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

Where there is only one manner of use of surface whereby minerals can be produced, lessee of oil, gas or mineral rights has right to pursue this use, regardless of surface damage.

[4] Mines and Minerals 260 € 73.1(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

Where there is an existing use by surface owner which would otherwise be precluded or impaired and where, under established practices in the industry, there are alternatives available to lessee of oil, gas or mineral rights whereby minerals can be recovered, rules of reasonable usage of surface may require adoption of an alternative recovery method which does not preclude or impair use of surface.

[5] Mines and Minerals 260 52

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k52 k. Injunction and Receivers. Most
Cited Cases

Under evidence that surface owner's irrigation system which was capable of clearing obstacles less than seven feet in height afforded surface owner the most advantageous, and perhaps the only reasonable means of developing surface for

agricultural purposes and that oil and gas lessee had available to it two types of pumping installations which would not protrude more than seven feet above surface, surface owner which brought action to restrain lessee from using vertical space that prevented use of the irrigation system was entitled to show his right to an accommodation between the two estates.

[6] Trial 388 €==352.10

388 Trial

388IX Verdict

388IX(B) Special Interrogatories and Findings 388k352 Preparation and Form of Interrogatories or Findings

388k352.10 k. Interrogatories Assuming Facts or on Weight of Evidence. Most Cited Cases

(Formerly 388k352(10))

In action by surface owner to restrain oil and gas lessee from using vertical space for pumping units that prevented use of an automatic irrigation sprinkler system which could clear obstacles only if they were less than seven feet in height, use of term "excess in height" in issue asking jury whether lessee's erection of pumping units at such excess in height so that sprinkler system would not pass over same was erroneous in that it was a comment upon weight of evidence and called for weighing of harm or inconvenience to surface owner against considerations pertaining to lessee.

[7] Mines and Minerals 260 \$\iint\$73.1(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts 260II(C) Leases, Licenses, and Contracts 260II(C)3 Construction and Operation of

Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

To force oil and gas lessee to change its method of using surface to accommodate surface owner's irrigation system, there would have to be a determination that use under attack was not reasonably necessary; weighing of harm or inconvenience to surface owner against considerations pertaining to lessee was improper.

[8] Mines and Minerals 260 € 73.1(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

Burden of proving that under all circumstances, use of surface by mineral lessee is not reasonably necessary is upon surface owner.

[9] Mines and Minerals 260 € 73.1(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

Elements to be considered by trier of facts in resolving issue of reasonable necessity of surface use by oil and gas lessee which maintained pumping units which interfered with surface owner's irrigation system were whether use which lessee was making of surface was not reasonably necessary because of noninterfering and reasonable

ways and means of producing minerals that were available to it, the use of which would obviate abandonment by surface owner of his existing irrigation system and whether alternatives available to surface owner would be impracticable and unreasonable under all conditions.

[10] Mines and Minerals 260 \$\infty\$ 73.1(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

If oil and gas lessee was making an unreasonable use of surface in maintaining pumping units which interfered with surface owner's irrigation system, lessee would have right to install noninterfering pumping units and, in such event, would not be liable in damages beyond decrease in value of use of land from time interfering pumps were installed to time of their removal.

[11] Mines and Minerals 260 € 73.1(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k73.1 Premises Demised and Rights Acquired

260k73.1(6) k. Use and Enjoyment of Premises; Surface Rights and Liabilities. Most Cited Cases

(Formerly 260k73)

If surface owner should be found to have reasonable means of developing his land for agricultural purposes other than by use of irrigation

sprinkler system which was incompatible with pumps used by oil and gas lessee, surface owner would be required to yield to lessee's use of the pumps in absence of contention that pumps were not otherwise unreasonable.

[12] Appeal and Error 30 \$\infty\$ 1097(6)

30 Appeal and Error 30XVI Review

30XVI(M) Subsequent Appeals

30k1097 Former Decision as Law of the Case in General

30k1097(6) k. Effect of Decision of Intermediate Court on Subsequent Appeal to Higher Court. Most Cited Cases

In action brought by surface owner to restrain oil and gas lessee's use of pumps which interfered with owner's irrigation system, ruling of Court of Civil Appeals with regard to admissibility of evidence concerning acts of another lessee in placing its pumps in cellars so as not to interfere with the irrigation system, with which ruling Supreme Court agreed, was law of the case upon retrial after appeal.

*619 Clyde E. Willbern and Cloy D. Monzingo, Houston, Turpin, Smith, Dyer, Hardie & Harman, Irby L. Dyer, Midland, for petitioner.

Cayton, Gresham & Fulbright, Karl Cayton and William E. Fulbright, Lamesa, for respondent.

STEAKLEY, Justice.

John H. Jones, respondent, the surface owner of a tract of land in Gaines County, Texas, sued for an injunction to restrain Getty Oil Company, petitioner, an oil and gas lessee, from using vertical space for pumping units that prevent the use by him of an automatic irrigation sprinkler system, and for damages. Upon trial, the jury *620 found that it was not reasonably necessary for Getty to install pumps that prevented the operation of the irrigation system; and that by doing so Getty decreased the market value of the land \$117,475, and decreased

the value of the use of the land from the time of erection of the pumps until the trial by.\$19,000. The trial court granted Getty's Motion for Judgment Non Obstante Veredicto on the ground there was no evidence that Getty used more lateral surface than reasonably necessary. Upon appeal, the court of civil appeals reversed the judgment of the trial court, holding that vertical as well as lateral space was restricted to that which is reasonably necessary. The court remanded the case, however, on the further holding that the trial court had erroneously instructed the jury. One Justice dissented. 458 S.W.2d 93. Both parties have filed applications for writ of error. We affirm the judgment of the court of civil appeals.

In 1955 Jones purchased the 635 acre tract of land in question, which was subject to prior mineral leases in which he acquired no interest. Getty holds an oil, gas and mineral lease covering 120 acres in the west half of the tract; Amerada Petroleum Corporation holds a similar lease covering the remainder of the western half of the tract. The lease for the eastern half of the tract is held by Adobe Oil Company.

Jones has drilled seven irrigation wells since 1955, five of which are used to irrigate this tract of land. Prior to 1963, he used hand-moved, and later power roll, irrigation equipment to irrigate the tract. In 1963 he installed a self-propelled sprinkler irrigation system known as the 'Valley System.' This system consists of 1,300 feet of pipe supported at a height of seven feet above the ground by a series of steel towers which rotate in a clockwise direction around a pivot point. The system can negotiate most obstacles which are less than seven feet in height. The pivot points are connected by underground pipes to the irrigation wells. Labor is required only to move the system from one pivot point to another. There are six pivot points which provide for irrigation of the entire tract except for a few corner areas. At the time Jones installed the system Getty had one producing oil well in the northwest corner of the tract. This well had a beam-

type pumping unit considerably over seven feet in height; however, the unit was outside the circumference of the closest pivot point and did not interfere with operation of the sprinkler system.

In December of 1967 Getty drilled two additional wells on its 120 acres which produced but would not flow. Getty installed two beam-type pumping units, one of which is seventeen feet high at the top of its upstroke, and the other thirty-four feet high. Because of this height, the pumps preclude the use of four pivot points of Jones' irrigation system with a consequent depreciation in the value of the land because of the reduction in its production potential. Getty also has battery tanks placed on the land that are outside the circumference of the irrigation system and do not interfere with it.

Prior to the time Getty developed its two new wells, Adobe had drilled four wells on the eastern half of the Jones tract and had installed beam-type pumping units on each of the wells. Two of these wells were outside the circumference of the closest pivot points of the sprinkler system; the others would have interfered with the system and were placed in concrete cellars to provide clearance. In addition, the cellars were placed so that the support towers of the sprinkler system would pass around them. In its portion to the tract Amerada also has two wells within the circumference of the irrigation system but both utilize hydraulic pumping units which are less than seven feet in height at the well head and hence do not interfere with the irrigation system. The power unit for these hydraulic pumps is also located so as not to interfere with the system.

The oil and gas lease grants Getty the land 'for the purpose of investigating, exploring,*621 prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines, houses for its employees, and other structures thereon to produce, save, take care of, treat, transport, and own said products.' The lease

obligates the lessee to bury all pipe lines below ordinary plow depth when required by the lessor. The lease contains no specific provision concerning the vertical usage of the land.

Jones does not charge Getty with negligence nor deny Getty's right to determine the location of its wells and to install some type of pumping equipment when necessary for production. His position is that under the facts and circumstances it was not reasonably necessary for Getty to install pumping units in the manner which denies him the use of his irrigation equipment.

[1] Getty's principal contention is that it has a right to exclusive use of the superadjacent airspace above the limited surface area occupied by the pumps and that only the lateral surface of the land should be subject to the established rule of reasonably necessary surface usage. We disagree. It has long been recognized that ownership of real property includes not only the surface but also that which lies beneath and above the surface. The use of land extends to the use of the adjacent air. See United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); Broughton v. Humble Oil & Refining Co., 105 S.W.2d 480 (Tex.Civ.App.—El Paso 1937, writ ref'd); Schronk v. Gilliam, 380 S.W.2d 743 (Tex.Civ.App.—Waco 1964, no writ). Although the earlier cases were generally limited to a consideration of the lateral surface, we held in Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961), that the rule of liability of the mineral lessee for negligently and unnecessarily damaging the surface estate includes the subsurface. This decision implicitly recognized that there are vertical as well as lateral boundaries to the use of the surface estate by the oil and gas lessee. We now hold explicitly that the reasonably necessary limitation extends to the superadjacent airspace as well as to the lateral surface and subsurface of the land.

Getty further says that if it has acted in a reasonable manner in accomplishing the purposes of the oil and gas lease, its right to so use the

surface and the air above is absolute, and that the consequences to the owner of the surface estate are of no legal effect. The expert witnesses agreed that the beam-type pumping units used by Getty were more economical than the hydraulic pumping units; and there was no evidence of any intrinsic value to Getty from the extra expense of constructing below-surface cellars to house the beam-type units. So, Getty argues that their placement of the beamtype pumping units on the surface was authorized by the lease as a matter of law. The question to be resolved, then, is whether evidence may be entertained to show the effect of Getty's manner of surface use upon the use of the surface by Jones, together with the nature of alternatives available to Getty, in resolving the issue of reasonable necessity.

[2][3][4] It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease; but that the rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the owner of the servient estate. Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133 (Tex.Sup. 1967); General Crude Oil Co. v. Aiken, 162 Tex. 104, 344 S.W.2d 668 (1961); Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961); see Keeton & Jones, Tort Liability and the Oil and Gas Industry, 35 Texas L.Rev. 1 (1956); Comment, Land Uses Permitted an Oil and Gas Lessee, 37 Texas L.Rev. 889 (1959); Lambert, Surface Rights of the Oil and Gas Lessee, 11 Okl.L.Rev. 373 (1958); Davis, Selected Problems Regarding Lessee's *622 Rights and Obligations to the Surface Owner, 8 Rocky Mt.Min.L.Inst. 315 (1963). In another context we recently gave recognition to the surface soil as a natural resource in Acker v. Guinn, 464 S.W.2d 348 (Tex.Sup.1971): '(the mineral estate) owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however that the utility of the surface for agricultural * * * purposes

will be destroyed or substantially impaired.' The due regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary. There may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage. Kenny v. Texas 612 Sulphur Co., 351 S.W.2d Gulf (Tex.Civ.App.—Waco 1961, writ refd). And there may be necessitous temporary use governed by the same principle. But under the circumstances indicated here; i.e., where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.

The only evidence regarding reasonable means of irrigating this land is found in the testimony of witnesses presented by Jones. It was their testimony that a critical shortage of labor available to farms in the area necessitates the use of automatic sprinkling equipment in irrigating the land. Indeed, Jones testified that the decreasing availability of labor was the controlling factor in his installation of the self-propelled sprinkler system in 1963. Getty sought by cross examination of the witnesses to establish that manual irrigation would suffice, or that a reversible automatic sprinkler would be an adequate alternative for Jones; all, however, rejected manual irrigation as a realistic alternative because of the labor shortage. Neither did the witnesses consider the reversible system a suitable substitute since it would require supervision night and day to avoid collision with the pumps; and that, even if supervisory labor is available, loss of a day's watering would result from moving the system to its proper position by the reversal procedures.

Although disputed by Getty, there was

evidence to show that it had reasonable alternatives for obtaining its oil. A petroleum engineer presented by Jones testified that the construction of cellars adequate for the two pumping units required by Getty would have cost less than \$12,000 when the pumps were initially installed, and that natural air circulation would alleviate the danger of hydrogen sulfide gas collecting in the cellars. He further testified that installation of large hydraulic pumps would have initially cost less than \$5,000 more than the present pumps and would have annual operations costing from \$350 to \$1,000 more per year. Another witness for Jones was a contract pumper for Adobe who was currently operating two beam-type pumps in cellars, together with twenty-five beam-type pumps on the surface. He testified that less maintenance was necessary on the units in the cellars than on the ones on the surface and that there was less leakage of hydrogen sulfide gas; he also testified that the prevailing winds ventilated the cellars.

[5] The record thus indicates that the irrigation system currently in use affords Jones the most advantageous, and perhaps the only reasonable means of developing the surface for agricultural purposes. It is also indicated that there is available to Getty the two types of pumping installations—the beam-type pumps in cellars or the hydraulic pumps on the surface—which are reasonable alternatives to its present use of the surface; and that Getty's use of an alternative method of producing its wells would serve the public policy of developing*623 our mineral resources while, at the same time, permitting the utilization of the surface for productive agricultural uses. Under such circumstances the right of the surface owner to an accommodation between the two estates may be shown, dependent, of course, upon the state of the evidence and the findings of the trier of the facts. Here, the trial court submitted the following special issue and accompanying instruction:

'Do you find from a preponderance of the

evidence that Getty Oil Company's erection of the pumping units in question at its Numbers One and Two Wells at such excess in height so that Plaintiff's sprinkler system will not pass over the same constituted a use of the surface of the land in question in a manner which is not reasonably necessary?

'In answering the foregoing Special Issue, you are instructed that a determination of whether the erection of such pumping units by Getty Oil Company constitutes a use of the surface of the land in question in a manner which is not reasonably necessary involves weighing the degree of harm or inconvenience, if any, such pumping units cause to John H. Jones against the utility, if any, of such pumping units to Getty Oil Company and the suitability of other measures, if any, which would substantially serve the purpose of such pumping units to Getty Oil Company at less or no inconvenience or harm, if any, to John H. Jones.'

[6][7][8][9] We agree with the court of civil appeals that inclusion of the phrase 'at such excess in height' in the issue was erroneous as a comment upon the weight of the evidence. Additionally, and as also recognized by the court of civil appeals, the accompanying instruction erroneously calls for a weighing of harm or inconvenience to Jones against the considerations pertaining to Getty. This is not the proper test, particularly in the suggestion that inconvenience to Jones may be a controlling element. There must be a determination that under all the circumstances the use of the surface by Getty in the manner under attack is not reasonably necessary. The burden of this proof is upon Jones, the surface owner. Cf. Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133 (Tex.Sup.1967). Jones sought to discharge this burden by showing that the use which Getty is making of the surface is not reasonably necessary because of non-interfering and reasonable ways and means of producing the minerals that are available to Getty, the use of which will obviate the abandonment by Jones of his existing use of the surface, and that the alternatives

available to Jones would be impractical and unreasonable under all the conditions. These are the elements to be considered by the trier of facts and the jury should be so instructed in resolving the issue of the reasonable necessity of the surface use by Getty, the mineral lessee.

[10] We further hold, as urged by Getty, that in event it is ruled that Getty is making an unreasonable surface use, Getty will have the right to install non-interfering pumping units; and in such event Getty will not be liable in damages beyond the decrease in the value of the use of the land from the time the interfering pumps were installed to the time of their removal.

The judgment of the court of civil appeals is affirmed.

McGEE, Justice (dissenting). I respectfully dissent.

The mineral lease under which Getty claims is dated January 15, 1948. Jones purchased the 635 acres in question in 1955, long after the execution of the lease. At the time of Jones' purchase of the surface, there was a well equipped with a rod and beam pumping unit, a tank battery and heater treater on the land. After his purchase, Jones, a cotton farmer, drilled seven water wells for the irrigation of his crops. Initially, between 1956 and 1963, Jones irrigated*624 the land with handmoved equipment, then later in the same period with power-moved equipment. Still later, in 1965, he installed a self-propelled irrigation system consisting of 1300 feet of pipe mounted seven feet above the ground which rotate automatically from pivot points. The only labor thus involved is the moving of the unit from one pivot point to another.

In January, 1968, Getty completed two more producing wells on the land, both requiring pumping units. One of the units extends seventeen feet above the ground and the other extends thirty-four feet above the ground (at the top of the upstroke of the beam). These pumping units prevent

the operation of Jones' Valley Irrigation System.

Jones does not charge Getty with negligence or contest Getty's right to determine the location of its oil wells or its right to install some type of pumping equipment. At the time the first well was drilled and a pumping unit installed, there was no question that Getty's action in so doing was authorized under the terms of the lease. Jones bought this surface with full knowledge of the lease and the presence of the original pumping unit and the possibility of the drilling of additional wells which might also require pumping units. Now, by changing the nature of his surface operations, Jones seeks to alter the terms of the prior mineral lease and to impose additional burdens on the oil and gas lessee which are not imposed by the original oil and gas lease.

It is fundamental that by the oil and gas lease, Getty obtained the dominant estate. Getty has the right to the use of as much of the premises as is reasonably necessary to comply with the terms of the lease and to effectuate its purposes. Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133 (Tex.Sup.1967); Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362, 65 A.L.R.2d 1352 (1957); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410 (1954). There is no contention by Jones in this case that Getty is 'using more land than necessary' to effectuate the purposes of the lease.

There is no express provision in the lease requiring that pumping units or other structures be placed in cellars beneath the top of the ground. Indeed, the lease specifically and expressly provides to the contrary. The oil, gas and mineral lease here involved is as follows:

'* * grants, leases and lets, exclusively unto lessee the following described land in Gaines County, Texas: (describing W/2 Sec. 4, less 5 acres) and any and all lands or rights and interests in land owned or claimed by lessor adjacent or continuous to the land above described.'

The foregoing grant of land is modified only by a purpose clause as follows:

* * * for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas, and all other minerals, laying pipe lines, building roads, tanks, power stations, telephone lines, houses for its employees and other structures thereon to produce, save, take care of, treat, transport and own said products. * * * *

The lease deals expressly with the question of the horizontal and vertical locations of Getty's equipment and installations, as follows:

* * * when required by Lessor, Lessee will bury all pipelines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessor's consent.'

This case is simple. Getty claims the right to place pumping units on the top of its well sites to a height necessary to effectuate the purposes of its lease. Jones claims a right to come over the top of the *625 well site with his irrigation equipment at a point about seven feet above the ground. The two claimed rights cannot exist simultaneously. By the terms of the lease, Getty has the right to utilize the air space to a height above its well sites as is reasonably necessary to effectuate the purposes of the oil and gas lease.

The only specific provision of the lease requiring the lessee to bury equipment provides that the lessee must buy all pipe lines below ordinary plow depth when required by the lessor. To hold that roads, tanks, pumping units, power stations, telephone lines, houses for employees and other structures are, or might be, required to be buried by this clause or by the purpose clause is to give the lease an unreasonably strained construction. Here the parties dealt expressly with the subject of what, if any, of Getty's equipment must be buried below the surface. These express provisions require application of the principles of law stated in Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W.2d 1039:

'Implied covenants can only be justified upon the ground of legal necessity. Such a necessity may arise out of the terms of the contract or out of the substance thereof. One absolutely necessary to the operation of the contract and the effectuation of its purpose is necessarily implied whether inferable from any particular words or not. It is not enough to say it is necessary to make the contract fair, or that it ought to have contained a stipulation which is not found in it, or that, without such covenant, it would be improvident or unwise or would operate unjustly; for men have the right to make such contracts. Accordingly courts hesitate to read into contracts anything by way of implication, and never do it except upon grounds of obvious necessity.'

Further, it is elementary that an express stipulation upon a matter excludes the possibility of an implication upon the same subject.

This Court should not rewrite the oil and gas lease which was of record when Jones purchased the property. The majority is, in the face of express language, reading into the lease an implied covenant requiring Getty to alter its operations at its expense to accommodate Jones in order that the latter may operate his farm more efficiently whenever and wherever the uses of the surface might change. To read the lease now, 22 years after the document was executed, in this manner is contrary to, rather than in accord with, the intention of the original parties to the agreement. Warren Petroleum Corp. v. Monzingo, Supra. In Monzingo, the Court refused to imply an obligation upon the lessee to restore the surface of the leased premises to its original condition after expiration of a lease: 'Admittedly the lease contained no such provision and one is not to be read into the contract by implication.' 157 Tex. at 481, 304 S.W.2d at 363.

The majority opinion holds that testimony that pumping units could be installed in a cellar 24 feet below the top of the surface raises a fact issue as to how much air space above the top of the surface may be occupied by the oil and gas lessee's equipment which is being used to produce oil from

the well. Such a holding would permit a jury to find that pumping units (and other oil and gas development and production equipment) must be located Below the surface of the earth, despite the express provisions of the oil and gas lease and the holdings of our courts, thus depriving the oil and gas lessee of its Right to occupy and use the surface for its oil and gas operations. See Warren Petroleum Corp. v. Martin, Supra; Warren Petroleum Corp. v. Monzingo, Supra; Humble Oil and Refining Co. v. Williams, Supra; Texas Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717 (1915); Gregg v. Caldwell-Guadalupe Pick-Up Stations, 286 S.W. 1083 (Tex.Comm.App.1926, holding approved); Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649 (Tex.Civ.App.—1941, writ refd); *626Trinity Production Co. v. Bennett, 258 S.W.2d (Tex.Civ.App.—1953, writ refd n.r.e.); Sinclair Prairie Oil Co. v. Perry, 191 S.W.2d 484 (Tex.Civ.App.—1945, no writ); Baker v. Davis, 211 S.W.2d 246 (Tex.Civ.App.—1948, no writ); Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex.Civ.App.—1919, writ dism'd); Placid Oil Co. v. Lee, 243 S.W.2d 860 (Tex.Civ.App.—1951, no writ); Pitzer & West v. Williamson, 159 S.W.2d 181 (Tex.Civ.App.—1942, writ dism'd); Miller v. Crown Central Petroleum Corp., 309 S.W.2d 876 (Tex.Civ.App.—1958, no writ); Parker v. Texas Co., 326 S.W.2d 579 (Tex.Civ.App.—1959, writ ref'd n.r.e.); Cozart v. Crenshaw, 299 S.W. 499 (Tex.Civ.App.—1927, no writ); and Gulf Oil Corp. v. Walton, 317 S.W.2d 260 (Tex.Civ.App.—1958, no writ).

It is difficult to believe that this Court would hold that such testimony should render useless the express grant in the oil and gas and disregard prior court decisions. The oil and gas lease becomes a mere letter in the sand, to be washed away by the tidal wave which will be caused by the majority holding. If the majority is correct, then the lease does not mean what it says; the oil and gas lessee has the right to use the surface of the land and place the development and production equipment 'thereon.'

If the irrigation wells on Jones' land go dry and the best surface use becomes grazing cattle on the land, would this Court require the lessee to raise entrenched pumping units to avoid the danger of cattle falling into the hole or to fence around the units? I think not. Jones v. Nafco Oil and Gas, Inc., 380 S.W.2d 570 (Tex.Sup.1964); Warren Petroleum Corp. v. Martin, Supra.

It should also be noted that the Court's opinion allows Jones to have his cake and eat it too. He purchased the land in question from the original lessor subject to an oil and gas lease, and no doubt paid less for the land than if he had bought the full fee title. Now the majority allows him to recover damages because the lessee is using the land in such a way as to interfere with his farming operations. Further, the majority allows him to require the lessee to bury his equipment, thereby giving him a more valuable estate than the one he originally contracted to buy. The majority opinion, in effect, makes the dominant estate the servient estate and the servient estate the dominant estate.

Even if one agrees with the rationale of the majority, there is no reason or authority for requiring the lessee to bear the cost of burying the equipment when the only benefit insures to the lessor or surface owner.

The majority says:

'It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease; But that the rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the owner of the servient estate.' (Emphasis added.)

We said in Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863, at 866:

'We further held that since the lessee was the owner of the dominant estate he had the right to use so much of the premises as was reasonably

necessary to the exclusion of the lessor in order to carry out the purposes of the mineral grant, But even so that right must be reasonably exercised with due regard to the rights of the owner of the surface.' (Emphasis added.)

We then held, at 867:

'The ultimate issue was whether Brown was Negligent in the way and Manner in which he disposed of the salt water.' (Emphasis added.)

In Humble Oil and Refining Co. v. Williams, 420 S.W.2d 133, at 134 (Tex.Sup.1967), we said:

'A person who seeks to recover from the lessee for damages to the surface has *627 the burden of alleging and proving either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary. Warren Petroleum Corp. v. Monzingo * * *; Robinson Drilling Co. v. Moses, Tex.Civ.App.1953, 256 S.W.2d 650, no writ; Finder v. Stanford, Tex.Civ.App.1961, 351 S.W.2d 289, no writ.'

The majority recognizes that Jones does not charge Getty with negligence nor deny Getty's right to determine the location of its wells and to install some type of pumping equipment when necessary for production. Jones does not contend that Getty is using more surface than necessary.

There is no evidence in this record that the use of the beam-type unit was not reasonably necessary to produce these wells. No one complains about the height of the units from the base to the top. Thus, the vertical space occupied immediately above the well is admittedly not excessive. Jones is contending that Getty, though free from negligence, is liable for damages, and should be forced to bury its equipment at Getty's expense, to permit Jones to employ a method of irrigation that can pass over the well site. This Court is rewriting the oil and gas lease covering the land subsequently purchased by Jones, simply because of inconvenience to Jones.

Prior decisions have contained statements that the oil and gas lessee and the lessor or surface

owner must exercise its right with due regard for the rights of the other. None of the decisions allows recovery of damages unless the contract requires payment of damages, Meyer v. Cox, 252 S.W.2d 207 (Tex.Civ.App.—1952, writ ref'd), absent a showing that the owner of the dominant estate has exercised its rights in a negligent manner or has used more land than is reasonably necessary to effectuate the purposes of the lease. Even if the majority is of the opinion that the injunction requiring the lessee to employ a different manner of pumping its wells is justified, There is no basis in law for allowing the surface owner to recover damages. Injunctions have been granted or denied under the 'due regard' theory, but No case has been cited, nor have I been able to find one, which would allow recovery of damages on this theory.

I agree with the dissenting opinion filed in the Court of Civil Appeals, 458 S.W.2d at 97, and would affirm the judgment of the trial court that Getty's use of the land is reasonable as a matter of law

POPE, J., joins in this dissent.
ON MOTION FOR REHEARINGSTEAKLEY,
Justice

There are stated misconstructions of the Court's opinion in Getty's Motion for Rehearing and in some of the supporting briefs by friends of the Court. Some we will notice. We do not hold that a mineral lessee's surface use may be found unreasonable without regard to the surface uses otherwise available to the surface owner. The reasonableness of a surface use by the lessee is to determined by a consideration of the circumstances of both and, as stated, the surface owner is under the burden of establishing the unreasonableness of the lessee's surface use in this light. The reasonableness of the method and manner of using the dominant mineral estate may be measured by what are usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses. What might be a reasonable use of the surface

by the mineral lessee on a bald prairie used only for grazing by the servient surface owner could be unreasonable within an existing residential area of the City of Houston, or on the campus of the University of Texas, or in the middle of an irrigated farm. What we have said is that in determining the issue of whether a particular manner of use of the dominant mineral estate is reasonable unreasonable, we cannot ignore the condition of the surface *628 itself and the uses then being made by the servient surface owner. When we take judicial notice of the relatively few reported cases of conflict which have arisen between the two estates on the more than 378,000 oil and gas wells that have been drilled, operated and produced in this State, many of them within cities, parks, lakes, and bays and on farms, prison lands and industrial sites, it is indicated that the usual and customary practice of the oil and gas operators of this State is to take due consideration of the uses being made by the servient surface owner. There is evidence of this in the alternative methods employed by Amerada and Adobe under their leases of other portions of the Jones tract. As indicated in the Court's opinion, if the manner of use selected by the dominant mineral lessee is the only reasonable, usual and customary method that is available for developing and producing the minerals on this particular land then the owner of the servient estate must yield. However, if there are other usual, customary and reasonable methods practiced in the industry on similar lands put to similar uses which would not interfere with the existing uses being made by the servient surface owner, it could be unreasonable for the lessee to employ an interfering method or manner of use. These considerations involve questions to be resolved by the trier of the facts.

[11] A single or a multiple issue submission may by in order depending on the facts and circumstances in a given situation. The evidence and circumstances here are such that a proper initial inquiry would be whether Jones had reasonable means of developing his land for agricultural purposes other than by use of the sprinkler system

in question. If this is found to be the case, Jones must yield to the surface use adopted by Getty since it is not contended that the beam-type pumps installed by Getty are otherwise unreasonable. If such is not found to be the case, Jones is under the burden of a second showing that Getty's present manner and method of use on this land is unreasonable because there are alternative methods used in the industry on this type of property which are available to Getty whereby it can produce its wells without interfering with the existing uses of the servient estate being made by Jones. If this is found to be the case, Getty is bound to convert to a noninterfering use. We have not held, as some have stated, that the issue is a question of inconvenience to the surface owner. To the contrary, the instruction accompanying the special issue submitted to the jury in this case was ruled erroneous because it indicated exactly this.

[12] We also make clear, in response to Jones' Motion for Rehearing, that the ruling of the court of civil appeals with respect to the admissibility of evidence concerning the acts of Adobe in placing its pumps in cellars, with which we agreed, is the law of the case upon retrial.

The Motions for Rehearing are overruled.

Concurring opinion by GREENHILL, J. WALKER, J., concurs in the Order. McGEE, J., dissenting. GREENHILL, Justice (concurring).

The decision in this case can rest on a narrower basis, and I would prefer a narrower holding.

As I understand the record, before Getty installed its beam type pump within the irrigated area of Jones, there were already two different types of pumping units in operation in the immediate area. Adobe Oil Company had placed its pumping units in concrete cellars; and an Adobe pumper testified that they required less maintenance, and leaked less sulphide gas than the surface pumps. Amerada had installed its two wells with non-interfering hydraulic pumps.

*629 So when Getty got ready to put its pumps in the irrigated area, it had three choices, two of which would not have interfered with the existing irrigation system. It chose to use the surface beam type pump and thus chose to exercise what it regarded as its rights whether it injured Jones or not. In my opinion, the above facts and circumstances constitute some evidence to support the jury's finding that Getty's use of the surface was in a manner which was not reasonably necessary.

While the opinion of the court points out the facts that the irrigation system was already in existence when Getty installed its pump, and that others in the area were using different ways to produce the oil, the court's holding is not expressly limited to conditions in existence when Getty's pumps were installed on the irrigated area. Perhaps it would be dictum for the court to say more. But so that there might be no misunderstanding at least as far as I am concerned, I would limit this holding to the conditions at the time the pumps were installed. I would not hold that Getty, or anyone else, would have to move its pumps if they were in place before Jones purchased and installed his irrigation system. For example, if Jones decided to use a mobile irrigation system in the northwest corner where Getty had had its surface pump already operating, my opinion as to how the case should be decided would be different. I would think that the surface owner could not compel the oil and gas lessee to change its operations because the surface owner decided to change his operations. At least that would be a different ball game. In that event, it would seem proper to me for the surface owner to pay for the necessary changes in the oil and gas lessee's operations, or at least to contribute to such expense, depending in part on what benefit there might be to such lessee.

So I regard the holding in this case as being a narrow one, and as applying to a situation where, viewing the record in the light most favorable to the jury's verdict, the oil and gas lessee deliberately chose to install its surface pumps so as to destroy or

seriously impair an existing surface irrigation system, where the evidence shows that it had at least two alternative choices which apparently seemed reasonable enough to other oil operators on the same property.

TEX 1971. Getty Oil Co. v. Jones 470 S.W.2d 618, 53 A.L.R.3d 1

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TAB #8

Landreth v. Melendez

Westlaw.

Page 1

948 S.W.2d 76, 137 Oil & Gas Rep. 170 (Cite as: 948 S.W.2d 76)

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Court of Appeals of Texas, Amarillo. Robert E. LANDRETH, Appellant, Cesareo MELENDEZ, et al., Appellees,

No. 07-96-0248-CV. June 30, 1997. Rehearing Overruled Aug. 1, 1997.

Surface owners brought action against oil and gas lease operator, contending that operator had failed to reasonably accommodate owners by employing pumping method for new oil wells that would permit operation of owners' irrigation system, and seeking injunctive relief and damages. The 121st Judicial District Court, Terry County, Ray D. Anderson, J., entered judgment for owners, awarding damages and issuing permanent injunction. Operator appealed. The Court of Appeals reversed and remanded. All parties moved for rehearing. The Court of Appeals, Charles L. Reynolds, Senior Justice (Retired), held that: (1) mineral reservation in prior deed unambiguously absolved mineral owners from liability for damage to surface if all usual, necessary, and convenient means were used to explore for, produce, and remove oil, gas, and other minerals; (2) accommodation doctrine respecting a surface owner's existing use did not apply in light of mineral reservation; (3) some evidence existed, but owners failed to establish that operator's production from new oil wells using conventional pump jacks was not by "all usual, necessary and convenient means" within meaning of mineral reservation; and (4) it would remand action, and owners would have burden on remand to show that operator had not used usual, necessary, and convenient means to produce minerals.

Reversed and remanded.

West Headnotes

[1] Mines and Minerals 260 € 55(2)

260 Mines and Minerals 260II Title, Conveyances, and Contracts 260II(B) Conveyances in General 260k55 Grants and Reservations of Minerals and Mining Rights

260k55(2) k. Construction and Operation in General. Most Cited Cases

Interpretation and construction of mineral reservation in deed was controlled by intention expressed by language used in instrument.

[2] Mines and Minerals 260 € 55(2)

260 Mines and Minerals 260II Title, Conveyances, and Contracts 260II(B) Conveyances in General 260k55 Grants and Reservations of Minerals and Mining Rights 260k55(2) k. Construction and Operation in General. Most Cited Cases

Mines and Minerals 260 55(8)

260 Mines and Minerals 260II Title, Conveyances, and Contracts 260II(B) Conveyances in General 260k55 Grants and Reservations of Minerals and Mining Rights 260k55(8) k. Remedies. Most Cited Cases

For purposes of interpreting and construing mineral reservation in deed, if reservation was phrased in language that could be given certain or legal meaning or interpretation, it was not "ambiguous," and proper construction of language in deed was question of law for court.

[3] Mines and Minerals 260 € 55(2)

260 Mines and Minerals 26011 Title, Conveyances, and Contracts 260II(B) Conveyances in General 260k55 Grants and Reservations of Min-

erals and Mining Rights

260k55(2) k. Construction and Operation in General. Most Cited Cases

Absent ambiguity, mere disagreement over interpretation of mineral reservation in deed would not make reservation "ambiguous," for a party's construction was immaterial.

[4] Mines and Minerals 260 €==55(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts 260II(B) Conveyances in General

260k55 Grants and Reservations of Minerals and Mining Rights

260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases

Mineral reservation in deed unambiguously absolved mineral owners from liability for damage to surface if all usual, necessary, and convenient means were used to explore for, produce, and remove oil, gas, and other minerals, where deed language clearly and plainly reserved to mineral owners right "to take all usual, necessary and convenient means," as enumerated, to explore for, produce, and remove oil, gas, and other minerals under surface, and language specified that mineral owners were absolved from liability for damage to surface when exploration and production was "as aforesaid."

[5] Mines and Minerals 260 €==55(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts 260II(B) Conveyances in General

260k55 Grants and Reservations of Minerals and Mining Rights

260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases

With mineral reservation of record in prior deed and recitals as to minerals in deed by which surface owners acquired surface, surface owners became bound by operation of reservation and, thus, when surface owners took title to surface, they were on notice of mineral owners' right under reser-

vation to use as much of surface as was required in employing "all usual, necessary and convenient means" to further explore for, produce, and remove minerals, which might require additional oil pumping units, without being liable for damage to surface.

[6] Mines and Minerals 260 \$\iint_55(6)\$

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights

260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases

Mines and Minerals 260 € 55(8)

260 Mines and Minerals

260II Title, Conveyances, and Contracts 260II(B) Conveyances in General

260k55 Grants and Reservations of Minerals and Mining Rights

260k55(8) k. Remedies. Most Cited

Cases

Surface owners were not entitled to relief from operations of oil and gas lease operator unless operator's exploration, production, and removal of minerals was by method other than all usual, necessary, and convenient means, absent any claim that operator was negligent in his activities, in surface owners' action against operator, contending that operator had failed to reasonably accommodate surface owners by employing pumping method for new oil wells that would permit operation of surface owners' irrigation system, where surface owners were bound by mineral reservation in deed allowing mineral owners to use as much of surface as was required in employing "all usual, necessary and convenient means" to further explore for, produce, and remove minerals without being liable for damage to surface.

[7] Mines and Minerals 260 \$\iins\$55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights

260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases

Accommodation doctrine respecting a surface owner's existing use did not apply in surface owners' action against oil and gas lease operator, contending that operator had failed to reasonably accommodate surface owners by employing pumping method for new oil wells that would permit operation of surface owners' irrigation system, given rights reserved to mineral owners by reservation in prior deed; present case was not situation in which usual rights implied from a standard lease in favor of mineral estate were to be exercised with due regard to surface owners' rights to be accommodated in existing use of surface but, instead, it was situation in which mineral owners were under no obligation to accommodate surface owners in existing use of surface so long as mineral owners used "all usual, necessary and convenient means" in conducting their operations, as provided in reservation.

[8] Mines and Minerals 260 € 55(8)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights

260k55(8) k. Remedies. Most Cited

To be entitled to relief, surface owners had burden of proof to establish that oil and gas lease operator's production from new oil wells was not by "all usual, necessary and convenient means" within meaning of mineral reservation in prior deed, in surface owners' action against operator, contending that operator had failed to reasonably accommodate surface owners by employing pumping method for new wells that would permit operation of surface owners' irrigation system, where reservation al-

lowed mineral owners to use as much of surface as was required in employing "all usual, necessary and convenient means" to further explore for, produce, and remove minerals.

[9] Mines and Minerals 260 € 55(8)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(8) k. Remedies. Most Cited

Cases

Some evidence existed, but surface owners failed to establish that oil and gas lease operator's production from new oil wells using conventional pump jacks was not by "all usual, necessary and convenient means" within meaning of mineral reservation in prior deed, in surface owners' action against operator, contending that operator had failed to employ pumping method for new wells that would permit operation of surface owners' irrigation system; evidence indicated that low-profile pump units were not usual, but were used, in area, and there was evidence of need for conventional pump jacks.

[10] Appeal and Error 30 € 1178(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause 30XVII(D) Reversal

30k1178 Ordering New Trial, and Directing Further Proceedings in Lower Court

30k1178(1) k. In General. Most Cited

Cases

Court of Appeals would remand action, and surface owners would have burden on remand to show that oil and gas lease operator had not used usual, necessary, and convenient means to produce minerals within meaning of mineral reservation in prior deed, in owners' action against operator, contending that operator had failed to employ pumping method for new oil wells that would permit operation of owners' irrigation system, where trial court,

which applied accommodation doctrine, did not undertake to decide whether operator used all usual, necessary, and convenient means to produce minerals, some evidence existed, but owners did not show entitlement to relief requested, and operator did not establish that mineral reservation precluded owners' claims.

*78 Frank L. Lacy, Brownfield, for appellant.

Carr Fouts Hunt & Wolfe LLP, Charles R. Watson, Jr., Amarillo, for appellees.

Before BOYD, C.J., REAVIS, J., and REYNOLDS, Senior Justice. FN*

FN* Charles L. Reynolds, Chief Justice (Ret.), Seventh Court of Appeals, sitting by assignment. Tex. Gov't Code Ann. § 75.002(a)(1) (Vernon Supp.1997).

ON MOTIONS FOR REHEARING REYNOLDS, Senior Justice (Retired).

Following our 30 April 1997 reversal of the trial court's judgment and remand of this cause, all parties filed motions for rehearing. The motions are overruled, but our original opinion is withdrawn and, in lieu thereof, this opinion issued to further address reiterations presented in the motions for rehearing.

Robert E. Landreth, owner and operator of an oil and gas lease covering the mineral estate that had been severed from the surface, which was owned by Cesareo Melendez and wife, Prisaliana Melendez, and farmed by Cesareo Melendez and David Melendez (collectively, Melendez), perfected this appeal to challenge a bench-trial judgment decreeing Melendez's recovery of \$5,000 from him, and permanently enjoining him from interfering with Melendez's existing irrigation system. With two points of error, Landreth contends an express reservation in the Melendez's chain of title precluded the claims, and the evidence is legally and

factually insufficient to support those claims. We will reverse and remand.

In 1947, J.P. and Matilda Nystel, then owners of Section 9, Block C-38, PSL Survey, Terry County, executed an oil and gas lease covering the section, which has remained in force by continuing production of oil. Three years later, in 1950, the Nystels conveyed the surface of the section, specifying that:

There is excepted from this conveyance, and not conveyed hereby, all oil, gas and other minerals in, on and under the hereinbefore described land, and there is expressly reserved to and for the owners of the oil, gas and other minerals in, on and under the hereinbefore described land the right of ingress and egress with respect to said land and any part thereof for the sole and only purpose of testing, exploring, drilling, producing, marketing, mining and operating the hereinbefore described land for oil, gas and other minerals and for the purpose of laying pipe lines, building tanks, shafts, tunnels, power stations, roads and structures thereon to produce, mine, save and take care of said oil, gas and other minerals and to take all usual, necessary and convenient means for working, preparing, getting out and removing said oil, gas and other minerals from under and away from the hereinbefore described land. It is expressly understood that *79 there shall be no liability on the part of grantors herein, their heirs and assigns, to grantees herein, their heirs and assigns, for damages to the surface estate in the hereinbefore described land in connection with the testing, drilling, producing and marketing of oil, gas and other minerals from the hereinbefore described land as aforesaid.

In February 1989, Cesareo Melendez and wife, Prisaliana Melendez, purchased, "subject to any existing easements and reservations," the South one-half of Section 9 "SAVE AND EXCEPT all of the oil, gas and other minerals in, on and under and that may be produced from said lands and premises."

948 S.W.2d 76, 137 Oil & Gas Rep. 170

(Cite as: 948 S.W.2d 76)

At the time of the Melendez purchase, two wells were situated on the southwest quarter of the land. An injection well, drilled in 1951, and a tank battery were situated on the northeast quarter of the southwest quarter, and a producing oil well, the Nystel 3–B, drilled in 1983, was situated on the southeast quarter of the southwest quarter. Production from the Nystel 3–B well was obtained by the use of a "horse head" pump jack, which extended approximately 21 feet above ground at the top of its stroke.

Melendez grew irrigated cotton on the surface of the land. The southwest quarter was irrigated with a shortened center-pivot system which did not reach to the tank battery and the Nystel 3–B well.

In July of 1993, Landreth purchased the Nystel lease from Texaco, and also purchased portions of the underlying reversionary mineral estate. Landreth advised Melendez, apparently in April of 1994, of his intention to develop the property by drilling some additional wells. In the same month, Melendez installed a quarter section electric centerpivot irrigation system, and requested Landreth to make accommodations for the system. As a result of negotiations, they agreed that Landreth would, and in May of 1994 he did, construct ramps at his expense in order that Melendez's system would pass over the Nystel 3–B well.

In September of 1995, when Landreth made Melendez aware that he planned to drill two new wells, they had discussions attempting to accommodate the operations of each. Unable to reach an accord, Landreth drilled and completed the Nystel 4–B and 5–B oil wells from November of 1995 to January of 1996. Conventional pump jacks were installed so that they were no higher than the pump jack on the Nystel 3–B well.

In February of 1996, Melendez initiated the action underlying this appeal. Pleading that Landreth had failed to reasonably accommodate them by employing methods that would permit the operation of the irrigation system, Melendez alleged that the

pumping units rendered the irrigation system useless, resulting in damage to, and excessive use of, the land and damage to crops, which would continue unless Landreth was restrained. Melendez sought a temporary restraining order, a temporary injunction and, upon trial, an injunction permanently enjoining Landreth from maintaining the pumps at a point higher than that at which the irrigation system will pass, and damages. A temporary restraining order and, later, a temporary injunction were issued as Melendez prayed.

At trial, it was evinced that prior to the drilling of the two wells, Landreth and Melendez explored alternatives to the location of the wells and the use of conventional pump jacks. Directional drilling and use of low-profile pumping units were impractical to Landreth. His proposal to modify and maintain, at his expense, the irrigation system by erecting taller towers to pass over the wells was rejected by Melendez, it also being documented that the holder of the lien on the irrigation system objected to its modification.

Melendez relied on evidence that the conventional pumping units Landreth installed would not allow the irrigation system to pass over them, and raising the towers of the irrigation system would cause numerous problems. The use of conventional pumping units was an excessive use of the surface, and the units used more vertical space than low-profile units, the cost of which was not prohibitive, and which could be used to produce the minerals while allowing the irrigation system to pass over them. Although oil and gas operators preferred conventional pumping units, farmers preferred low-profile units, which usually are used when an irrigation *80 system is in place before the wells are drilled.

Landreth relied on evidence that the usual form of pump jacks was conventional, that it was necessary to employ the higher capacity conventional pump jacks to move the volumes of fluid underneath the surface, and that the proposed modification of the irrigation system by raising not more

948 S.W.2d 76, 137 Oil & Gas Rep. 170

(Cite as: 948 S.W.2d 76)

than three of 145 sprinkler heads would allow continued reasonable use of the surface. The low-profile pumping units, which were used on only one percent of the area wells, were unacceptable because of their expense, increased maintenance, limited pumping capacity, and safety problems posed by the accumulation of hydrogen gas in the below-ground cellars housing the pumps.

The trial court rendered judgment decreeing that Melendez recover from Landreth \$5,000, and that Landreth is permanently enjoined from interfering with the present irrigation system by maintaining pump jack units or other structures which raise to a height of more than 12 inches below the lowest portion of the physical irrigation unit. Making findings of fact and conclusions of law, the court found, inter alia, that the damages were \$2,500 for each well site, that Landreth's use of the pump jacks is not reasonable, and that the "accommodation doctrine" does apply to this case.

On appeal, Landreth contends, as he did in the trial court, that the unambiguous reservation in the chain of title to the land granted the mineral owner freedom from demands by the surface owners which form the basis for Melendez's damage claims and the permanent injunction imposed by the trial court. By the reservation, he asserts, there was reserved the right to build structures, such as conventional pump jacks, to produce the mineral estate, and the purchasers of the surface estate took it with the express understanding that their title excluded the right to collect damages in connection with the mineral operations. Moreover, he adds, since he used no more of the surface than reasonably necessary to produce the mineral estate, he was not required to accommodate the surface owners. Nevertheless, he opines, the trial court erroneously concluded that he had violated the common law duty, imposed in the absence of the reservation, to make reasonable efforts to accommodate the surface owners' use of the land.

Melendez responds that the rights reserved to the mineral owners were limited to usual, necessary, and convenient means of production, and the limitation necessitates the application of the accommodation doctrine, which is not inconsistent with the language of the reservation. Thus, Melendez argues, because the current irrigation system was in place before the development of the new wells, Landreth would have to accommodate the system when he developed the wells. By the judgment granting the injunction and damages, Melendez concludes that the trial court correctly preserved the rights of the surface owners to be free from unreasonable, excessive use of the surface and interference by the mineral owner.

Aside from their opposing contentions, Landreth and Melendez agree that the Nystel reservation is in their respective chains of title. They disagree on whether it is ambiguous. Landreth submits that it is clear and unambiguous; Melendez proposes that it is ambiguous because it is subject to multiple interpretations.

[1][2][3] The interpretation and construction of the reservation contained in the Nystel deed is controlled by the intention which is expressed by the language used in the instrument. Luckel v. White, 819 S.W.2d 459, 461 (Tex.1991). If the reservation is phrased in language that can be given a certain or legal meaning or interpretation, it is not ambiguous, Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154, 157 (1951), and the proper construction of the language in the deed is a question of law for the court. Luckel v. White, 819 S.W.2d at 461; Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 136 S.W.2d 800, 805 (1940). Absent an ambiguity, mere disagreement over the interpretation of the reservation will not make it ambiguous, Sun Oil Co. (Delaware) v. Madeley, 626 S.W.2d 726, 727 (Tex.1981), for a party's construction is immaterial. Id. at 732.

*81 [4] The reservation is unambiguous. It is phrased in language which clearly and plainly reserves to the mineral owners the right "to take all usual, necessary and convenient means," as enumerated, to explore for, produce and remove the oil,

gas and other minerals under the surface; and, the language specifies that when the exploration and production is "as aforesaid," *i.e.*, "all usual, necessary and convenient means" are used, the mineral owners are absolved from liability for damage to the surface.

[5][6] With the reservation of record and the recitals in the deed by which Melendez acquired the surface, Melendez became bound by the operation of the reservation. Westland Oil Development Corp. v. Gulf Oil, 637 S.W.2d 903, 908 (Tex.1982). Thus, when Melendez took title to the surface, he was on notice of the mineral owners' right to use as much of the surface as was required in employing "all usual, necessary and convenient means" to further explore for, produce and remove the minerals, which might require additional pumping units, without being liable for damages to the surface. Then, absent any claim that Landreth was negligent in his activities, if Melendez was entitled to relief from Landreth's operations, it was because Landreth's exploration, production and removal of the minerals was by a method other than all usual, necessary and convenient means.

[7] Given the rights reserved to the mineral owners by the reservation, it follows that this is not a situation where the usual rights implied from a standard lease in favor of the mineral estate are to be exercised with due regard to the rights of the surface owners to be accommodated in the existing use being made of the surface. See, e.g., Getty Oil Co. v. Jones, 470 S.W.2d 618, 621–22 (Tex.1971). Instead, it is a situation where the mineral owners are under no obligation to accommodate the surface owners in the existing use made of the surface so long as the mineral owners use all usual, necessary and convenient means in conducting their operations.

[8][9] Then, to be entitled to relief, Melendez had the burden of proof, *id.* at 623, to establish that Landreth's production from the two new wells was not by "all usual, necessary and convenient means." Melendez did not discharge the burden.

As earlier noticed, Melendez's position, and the proof adduced in support of it, was that since the center-pivot irrigation system was in place before Landreth drilled the last two wells, the means employed by Landreth in utilizing the conventional pump jacks interfered with the existing use being made of the surface with the irrigation system, and Landreth was required to accommodate the existing surface use, which could be accomplished by employing low-profile pump units. However, the proof that farmers prefer low-profile pump units and that they are used in one percent of the area wells shows that, albeit preferable to farmers, low-profile pump units are "uncommon, not usual," Black's Law Dictionary 1540 (6th ed.1990), and are not usual, i.e., "in common use," id at 1544, in the area wells. And, with evidence of the impracticality of the lowprofile pump units and the need for the conventional pump jacks to move volumes of subsurface fluids, Melendez's proof did not negate the necessity of Landreth's use of the conventional pump jacks.

In brief, Melendez failed to discharge his burden of showing that Landreth did not take "all usual, necessary and convenient means" to effect production. Indeed, in making its findings of fact, the trial court, applying the **accommodation doctrine**, omitted any reference to, and declined to make additional factual findings addressing, whether Landreth used all usual, necessary and convenient means to produce the minerals.

Under these circumstances, Melendez did not evince an entitlement to the relief requested. Neither did Landreth establish his first-point contention that the Nystel reservation precluded Melendez's claims. Because the trial court did not undertake to decide whether Landreth used all usual, necessary, and convenient means to produce the minerals, a judgment cannot be rendered on that issue unless it was established as a matter of law from the record. Although Landreth attempted to demonstrate that the evidence conclusively established conventional pump jacks were usual, necessary, and *82 convenient to his operations on the

Page 8

948 S.W.2d 76, 137 Oil & Gas Rep. 170 (Cite as: 948 S.W.2d 76)

Melendez land, such evidence, considered in the light of the evidence concerning the area use of law-profile pump units in similar situations, only posed the issue for resolution. As a result, the controlling issue still awaits a decision by the trier of fact.

[10] Accordingly, we overrule Landreth's first point of error and the legally insufficient evidence contention in his second point of error, but sustain the factually insufficient evidence contention in the second point. On remand, Melendez will have the burden to show that Landreth has not used the usual, necessary, and convenient means to produce the minerals.

The judgment is reversed and the cause is remanded.

Tex.App.-Amarillo,1997. Landreth v. Melendez 948 S.W.2d 76, 137 Oil & Gas Rep. 170

END OF DOCUMENT

TAB #9

Davis v. Devon Energy Prod. Co., L.P.

Westlaw.

Page 1

136 S.W.3d 419, 160 Oil & Gas Rep. 897 (Cite as: 136 S.W.3d 419)

D

Court of Appeals of Texas,

Amarillo.
Floyd DAVIS and Lloyd Davis, Appellants,

DEVON ENERGY PRODUCTION COMPANY, L.P., Appellee.

No. 07–02–0394–CV. May 27, 2004.

Background: Mineral lessee sought declaration that it had a superior right to use the surface for its oil and gas operations on landowners' land and a permanent injunction to enjoin landowners from interfering with the exercise of lessee's rights. The 121st District Court, Terry County, Kelly G. Moore, J., entered judgment in favor of mineral lessee. Landowners appealed.

Holdings: The Court of Appeals, Brian Quinn, J., held that:

- (1) trust was not necessary and indispensable party to action:
- (2) evidence was sufficient to support finding that use of caliche to build roads was reasonable accommodation; and
- (3) evidence was sufficient to support finding that landowners interfered with mineral lessee's production.

Affirmed.

West Headnotes

[1] Mines and Minerals 260 \$\iint_78.7(2)\$

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases
260k78 Testing or Working

260k78.7 Actions

260k78.7(2) k. Parties and

Pleading. Most Cited Cases

Family trust, which owned portion of land along with landowners and leased part of it to landowners, was not necessary and indispensable party to mineral lessee's action for injunctive relief against those who attempted to interfere with exercise by mineral lessee of its rights under mineral lease to use surface for its oil and gas operations; those purporting to interfere with mineral lessee's actions were landowners, not trust, trust was not required to be joined to completely adjudicate legitimacy of landowners' conduct, and trust would not be prejudiced by failure to be joined as party to action. V.T.C.A., Civil Practice & Remedies Code § 37.006(a).

[2] Parties 287 \$\infty\$ 51(2)

287 Parties

287IV New Parties and Change of Parties 287k49 Bringing in New Parties 287k51 Necessity and Grounds 287k51(2) k. Discretion of Court. Most

Cited Cases

As a general rule, trial courts exercise broad discretion in matters of joinder.

[3] Parties 287 5 79

287 Parties

287VI Defects, Objections, and Amendment 287k77 Nonjoinder of Party Plaintiff 287k79 k. Operation and Effect. Most Cited Cases

Parties 287 € 82

287 Parties

287VI Defects, Objections, and Amendment 287k81 Nonjoinder of Party Defendant 287k82 k. Operation and Effect. Most Cited Cases

A person's absence will seldom deprive a court of jurisdiction to adjudicate the rights of those who

Page 2

136 S.W.3d 419, 160 Oil & Gas Rep. 897 (Cite as: 136 S.W.3d 419)

are present.

[4] Contracts 95 € 176(1)

95 Contracts

95II Construction and Operation 95II(A) General Rules of Construction 95k176 Questions for Jury

95k176(1) k. In General. Most Cited

Cases

The construction or interpretation of a document is a question of law.

[5] Contracts 95 € 176(9)

95 Contracts

95II Construction and Operation 95II(A) General Rules of Construction 95k176 Questions for Jury 95k176(9) k. Subject-Matter. Most Cited Cases

The extent of an obligation, if any, imposed by a contract is a question of law since it is obviously dependent upon the interpretation of the contract.

[6] Contracts 95 \$\infty\$ 143(1)

95 Contracts

95II Construction and Operation 95II(A) General Rules of Construction 95k143 Application to Contracts in General

95k143(1) k. In General. Most Cited

Cases

Unless its terms are ambiguous, appellate court looks only to the words of the instrument to assess what it means and the extent of the obligations imposed, if any.

[7] Mines and Minerals 260 € 78.7(4)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k78 Testing or Working

260k78.7 Actions 260k78.7(3) Evidence 260k78.7(4) k. Weight and

Sufficiency. Most Cited Cases

Evidence was sufficient to support finding that use of caliche to build roads was reasonable accommodation necessary for mineral lessee to conduct its oil and gas operations on landowners' property; roads used to be caliche, landowners frequently plowed up roads, irrigation kept roads muddy much of the year, vehicles had trouble getting through roads and sometimes had to be pulled out with bull-dozers, 248 proposed well treatments were cancelled because roads did not allow passage, industry standards dictated need for all weather road to access well sites, landowners used caliche around their house, and caliche was found naturally below surface.

[8] Mines and Minerals 260 € 55(6)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights

260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases

The right to minerals in place carries with it the rights to enter and extract them and all other incidents thereto as are necessary to the enjoyment of those rights.

[9] Mines and Minerals 260 \$\infty\$78.7(4)

260 Mines and Minerals

260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)3 Construction and Operation of
Oil and Gas Leases

260k78 Testing or Working 260k78.7 Actions 260k78.7(3) Evidence

260k78.7(4) k. Weight and

Sufficiency. Most Cited Cases

Evidence was sufficient to support finding that

136 S.W.3d 419, 160 Oil & Gas Rep. 897

(Cite as: 136 S.W.3d 419)

landowners interfered with mineral lessee's production of oil and gas on landowners' property by unreasonably restricting ingress and egress to property and restricting reasonable and necessary use of property; landowner told employees they could not work on property, threatened employees, told lessee that it could not use caliche to build usable roads, testified he would continue to exercise his right to instruct lessee's employees and contractors about what to do on his land and that there would be trouble if caliche was used on his farm, and testified that he would continue to plow over lease roads.

*420 Don Graf, McCleskey Harriger Brazill & Graf, L.L.P., Lubbock, for appellants.

W. Clayton Gaston, Canon, Gaston & Strain, L.L.P., Midland, for appellee.

Before QUINN, REAVIS and CAMPBELL, JJ.

Opinion

BRIAN QUINN, Justice.

Floyd Davis and Lloyd Davis (the Davises) appeal from a permanent injunction entered against them and in favor of Devon Energy Production Company, L.P. (Devon). The dispute arose from the oil and gas operations by Devon on land the surface of which the Davises leased. Four points are before us. They concern whether 1) the trial court erred in failing to join the Myrtle Davis Trust as a necessary and indispensable party, 2) the evidence was legally and factually insufficient to support the trial court's finding that a 1991 letter and a 1997 letter were not enforceable agreements to which Devon was bound, 3) the evidence was legally and factually insufficient to support the finding that caliche was a reasonably necessary construction material, and 4) the evidence was legally and factually insufficient to support the finding that the Davises interfered with and unreasonably restricted Devon's right to use the surface for its oil and gas operations. We affirm the judgment.

Background

Devon is a mineral lessee and operator of the North Welch Unit (Unit) near Welch, Texas. The Davises either own or lease the surface of various parcels of land within that Unit and conduct farming operations thereon. However, they own no interest in the minerals underlying the surface.

Next, the roads utilized by Devon to conduct its operations are non-compacted dirt. According to the record, they become difficult to use after it rains or the surface tenants irrigate their land. Additionally, the Davises have plowed over the lease roads at their discretion and moved them to other locations. These circumstances have led to Devon's employees and contractors being unable, at times, to locate or use the roads to access the wells, particularly when driving trucks and hauling heavy equipment or chemical treatments. Eventually, Devon proposed to *421 make the lease roads permanent by building them with caliche. The Davises opposed this.

Devon filed suit seeking both a declaration that it had a superior right to use the surface of the land and a permanent injunction to enjoin the Davises from interfering with the exercise of Devon's rights. By judgment dated June 21, 2002, the trial court entered a judgment favorable to Devon, determined that the proposed use of the land by Devon was reasonable and necessary and that the use of caliche as a construction material was not unreasonable, and permanently enjoined the Davises from hindering or interfering with Devon's oilfield operations, which included the construction of permanent caliche roads.

Point One—Joinder

[1] In their first issue, the Davises argue that the Myrtle Davis Trust (the Trust) was a necessary and indispensable party to the suit. FNI Thus, the trial court could not litigate the dispute without its joinder, they continue. The record illustrates that the Trust owned a portion of the surface within the Unit and leased it to the Davises. Furthermore, it was not made a party to the litigation. Nevertheless,

136 S.W.3d 419, 160 Oil & Gas Rep. 897 (Cite as: 136 S.W.3d 419)

this circumstance does not mandate reversal of the judgment, and we overrule the issue.

FN1. Myrtle Davis is the mother of Floyd and Lloyd Davis.

[2][3] As a general rule, trial courts exercise broad discretion in matters of joinder. *Williamson v. Tucker*, 615 S.W.2d 881, 886 (Tex.Civ.App.-Dallas 1981, writ refd n.r.e.). Furthermore, a person's absence will seldom deprive a court of jurisdiction to adjudicate the rights of those who are present. *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex.1982).

The nature of the suit at bar was one for injunctive relief against those who attempted to interfere with the exercise by Devon of its rights under the mineral lease. Those purporting to interfere with Devon's actions, according to the record, were Lloyd and Floyd Davis, not the Trust. Thus, the Trust was not an indispensable party. See Parr v. Merritt, 532 S.W.2d 154, 159 (Tex.Civ.App.-Fort Worth 1976, writ ref'd n.r.e.) (holding that since Merritt sought only to enjoin Parr from obstructing a roadway, all the purported owners of the roadway were not necessary parties to the proceeding).

Moreover, we perceive no need to join the Trust to completely adjudicate the legitimacy of the conduct by the Davises viz Devon. Again, it is the Davises who excluded Devon from the property and threatened its employees, not the Trust or its representatives. Whether they were lawfully entitled to do so does not necessitate the involvement of the Trust. And, that resolution of the dispute may have involved the declaration of rights arising from the mineral lease is of no moment since that would not prejudice the Trust. Simply put, the Trust is free to pursue its own recourse against Devon if it concludes that Devon acted improperly. The prior adjudication rendered between the Davises and Devon will not bar or otherwise prejudice that. TEX. CIV. PRAC. & REM.CODE ANN. § 37.006(a) (Vernon 1997) (stating that a declaration of rights does not prejudice the rights of a person not a party to the

proceedings); Davis v. Weatherston, No. 04–00–0533–CV, 2002 WL 871407, 2002 Tex.App. LEXIS 3194, (Tex.App.-San Antonio, May 8, 2002, no pet.) (not designated for publication) (holding that since a declaration of rights would not affect one not made a party to the suit, the trial court's jurisdiction was not compromised).

*422 Given the foregoing, we must conclude that the trial court did not abuse its discretion in rejecting the Davises' complaint about the absence of the Trust. So, we overrule the issue.

Point Two—The 1991 and 1997 Agreements

In their second point, the Davises contended that 1) Devon entered into two agreements which prohibited the use of caliche on the roads, 2) Devon is bound by those agreements, and 3) the evidence is legally and factually insufficient to support the finding that it is not. We overrule the point.

[4][5][6] The construction or interpretation of a document is a question of law. *Elliott–Williams Co. v. Diaz,* 9 S.W.3d 801, 803 (Tex.1999); *Cross Timbers Oil Co. v. Exxon Corp.,* 22 S.W.3d 24, 26 (Tex.App.-Amarillo 2000, no pet.). Thus, it follows that the extent of an obligation, if any, imposed by a contract is also a question of law since it is obviously dependent upon the interpretation of the contract. And, unless its terms are ambiguous, we look only to the words of the instrument to assess what it means and the extent of the obligations imposed, if any. *National Union Fire Ins. Co. v. CBI Industries, Inc.,* 907 S.W.2d 517, 520 (Tex.1995).

As to the existence of an agreement prohibiting the construction of caliche roads, we turn to the letters purporting to illustrate the accord. The first is dated June 25, 1991. Written by Chevron U.S.A., Inc., a predecessor in interest to Devon, it is addressed to the Davises. In it, Chevron alluded to a meeting with the Davises and stated, among other things, that the "main purpose of this letter is [to] confirm our understanding of the major operating points we discussed." With respect to roads, Chev-

Page 5

136 S.W.3d 419, 160 Oil & Gas Rep. 897 (Cite as: 136 S.W.3d 419)

ron said:

Chevron has the legal right to build and maintain roads in the Unit that are reasonable for our production operations. While the courts have stated twenty (20) foot permanent roads are "standard" we feel ten (10) foot dirt roads for our infield well operations are preferred because this will keep the roads level with the fields and will help them to drain better. Also dirt roads will enable your cotton operations to be more economical by being able to plow over them. Immediately after the planting is completed, you can then restore the roads.

We also see the need for improved road maintenance by Chevron. The roads should be passable under reasonable circumstances and enable us and our contractors to get to the wells without having to drive out of the road beds and on to your crops. Your offering to provide us with surplus road building materials is greatly appreciated for the areas that are currently in need of greatest repair.

As can be seen, this provision said nothing about "caliche" or the construction of "caliche roads." Nor did the words used, when given their plain meaning, expressly illustrate an agreement to forego building caliche roads. At best, they evinced Chevron's desire for ten foot dirt roads. But, that it may have "preferred" building dirt roads of that size falls short of a promise to only construct roads of that size and type in perpetuity. FN2 This is especially so given the lack of words which can reasonably be read as a promise by Chevron to restrict itself to a particular type road.

FN2. We assume, *arguendo*, that caliche roads fall outside the category of dirt roads. The letter does not address that.

In short, that one may "prefer" coffee over tea does not mean he can never drink *423 tea. Similarly, that Chevron may "prefer" narrow dirt roads does not alone contractually bar it (or its suc-

cessors) from building wider permanent roads out of caliche. At the very least, nothing in the June 1991 letter evinces an intent to so restrict the company.

The second letter mentioned is dated May 21, 1997, and was sent to the Davises by Pennzoil Exploration and Production Company, another predecessor in interest to Devon. Furthermore, it dealt with the actions of contractors appearing on the land to perform work for the company. And, like the 1991 missive, it too said nothing about the use of caliche or making caliche roads. Nor did it even address the matter of building roads. Given this, we cannot read into the document a subject not addressed or intent not described therein. Cross Timbers Oil Co. v. Exxon Corp., 22 S.W.3d at 26–27.

There being no agreement prohibiting the use of caliche roads, we need not determine whether Devon was bound by them. Nor need we address the topics of legal and factual sufficiency raised by the Davises.

Point Three—Use of Caliche

[7] Via their third point, the Davises question the sufficiency of the evidence to support the trial court's finding that the use of caliche was reasonably necessary. We overrule the point.

[8] It is clear that the right to minerals in place carries with it the rights to enter and extract them and all other incidents thereto as are necessary to the enjoyment of those rights. Tarrant County Water Control & Improvement Dist. v. Haupt, 854 S.W.2d 909, 911 (Tex.1993). In other words, the lessee of a mineral lease has the right to use as much of the premises in such a manner as is reasonably necessary to effectuate the purpose of the lease. Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980). Yet, our Supreme Court has seen fit to protect the owners of the surface estate to some extent. And, the protection invoked by the Davises on appeal was first enunciated in Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex.1971). Recognizing that the lessee may use as much of the premises as

136 S.W.3d 419, 160 Oil & Gas Rep. 897

(Cite as: 136 S.W.3d 419)

is reasonably necessary to produce and remove the minerals, the Court nonetheless held that the lessee must exercise its right with due regard for the rights of the servient estate, i.e. the surface owner. Id. at 621. This concept has come to be known as the accommodation or alternative means doctrine. Tarrant County Water Control & Improvement Dist. v. Haupt, 854 S.W.2d at 911. And, in applying it, the Supreme Court stated that when there is an existing use of the land's surface by the surface owner which would be precluded or impaired, and when under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the circumstances "may require the adoption of an alternative by the lessee." Id. at 911, quoting Getty Oil Co. v. Jones, supra. Yet, this right of accommodation is dependent upon the evidence and findings by the trier of fact. Id. That is, whether the elements for accommodation have been established is a question of fact determined by the evidence presented to the trier of fact.

Furthermore, in explaining the doctrine in Getty, the Supreme Court viewed it as an extension of another holding it had previously made. That holding appeared in Acker v. Guinn, 464 S.W.2d 348 (Tex.1971). There, the Court discussed the nature of the estates created by the execution of a mineral lease. While doing so, it noted that while the owner of the lease acquires the dominant estate and the right to make reasonable use of the surface, "[i]t *424 is not ordinarily contemplated ... that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired." 1d. at 352. And, it is the language we quote that the Court in Getty deemed instructive. Getty Oil Co. v. Jones, 470 S.W.2d at 621-22. It indicated the need for a "due regard" of the surface owner's interests and helped define what to consider in determining whether a surface use by the lessee is reasonably necessary. Id.

We too find that language instructive in assessing the scope of the accommodation doctrine. And, the words found particularly instructive are those suggesting it is not contemplated that the surface will be used by the lessee in a manner that "destroyed or substantially impaired" its agricultural use. (Emphasis added). Together, they connote the need for something more than slight interference. Indeed, we gather from their use that not every impairment to the surface owner's utilization of the surface is enough. Rather, only when the conduct of the lessee destroys or substantially impairs the surface owner's use of the surface does the question arise as to whether that conduct is reasonably necessary. Given this and the fact that the Supreme Court relied on Acker in deriving the alternative means doctrine, it is reasonable to infer that the latter must apply only when the impairment experienced by the surface owner is, at the very least, substantial. With this said, we turn to the dispute before us.

Appearing in the record is evidence that 1) at one time, roads in a portion of the Unit and on the Davises' property had been caliche but had fallen in disrepair, 2) the current lease roads were not compacted because the Davises frequently plowed them up, 3) the roads were often just two tire tracks down a field, 4) the Davises' circular irrigation system, which was not in use at the time oil and gas operations commenced on the property, kept the roads muddy during the irrigation season, 5) the irrigation season approximated 180 days a year, 6) if a vehicle was unable to travel down a road, it would have to back up sometimes as much as a quarter of a mile to turn around, 7) trucks or heavy equipment were needed to service, drill and operate the wells, 8) sometimes those trucks and equipment had to be pulled out with a bulldozer, 9) lease operators who checked the wells for leaks or problems sometimes had to walk to a well location because the roads were impassable, 10) in a three month period, 248 proposed well treatments were cancelled because roads did not allow passage to the wells, 11) on one vehicle, the brakes had to be replaced six times in the first 32,000 miles due to the sandy and muddy roads, 12) during a safety drill, an emergency vehicle could not access the well location due to the

136 S.W.3d 419, 160 Oil & Gas Rep. 897 (Cite as: 136 S.W.3d 419)

Davises having plowed across the road, 13) usual and customary industry standards dictate the need for an "all weather road" to access well sites, 14) one expert was surprised by the lack of "a decent all weather road [at the Unit] that would allow the operator ... to conduct [its] business and have access to the well and batteries," 15) an operator needs access via "all weather roads, and that means caliche," 16) an operator has "got to have caliche pads to set equipment," 17) "[i]t's going to be extremely difficult to operate this unit [via secondary and tertiary recovery] going forward with increased technology, increased activity without having all weather roads and pads," and 18) the Davises used caliche around their house and to build a ramp to facilitate the operation of the irrigation system. So too was there evidence that the caliche would not cause the Davises a problem as long as they kept their plow out of it, that while Floyd Davis may not be able to always *425 keep his plow out of the caliche, a farmer could pick up his plow behind his tractor to avoid plowing caliche into his field, that the Davises, if they so choose, could probably avoid plowing into a caliche road, that caliche rock could be crushed to smaller, less troublesome sizes, that caliche appears naturally under certain portions of the Davis farm, and that plowing in the past has brought some of this naturally appearing caliche to the surface.

The foregoing constitutes some evidence supporting the factfinder's conclusion that Devon's "use and proposed use [i.e., building permanent caliche roads] of the Property is reasonable and necessary ..." and that the use of caliche as a road building material "is not unreasonable." And, upon considering the totality of the evidence, we cannot say that the determination is so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex.1986), overruled on other grounds by Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex.2000) (discussing the standard of review applicable when assessing whether a finding is supported by factually sufficient evidence).

As to the Davises' claim regarding the accommodation doctrine, we are cited to no evidence indicating that construction of permanent caliche roads would destroy their ability to conduct a profitable farming operation. FN3 And, though there exists some evidence suggesting that caliche may cause them problems, the trial court could have reasonably concluded, from the record before it, that any impairment had an insubstantial impact on the farming operations. Furthermore, such a finding would enjoy the support of both legally and factually sufficient evidence.

FN3. We assume, arguendo, that the issue was preserved for appeal. The record does not disclose whether the Davises requested the trial court to make any particular findings on the matter, though the topic is broached on appeal. Nor do the findings actually entered by the court expressly address the accommodation doctrine. See Eberts v. Businesspeople Personnel Serv., 620 S.W.2d 861. 862 (Tex.Civ.App.-Dallas 1981. no writ) (holding that defense urged on appeal was waived because the trial court did not address it in its findings and the defendant failed to request additional findings).

Point Four—Interference with Mineral Production

[9] Via their fourth and final issue, the Davises argue that the evidence was legally and factually insufficient to support the trial court's finding that they interfered with Devon's production of minerals. We overrule the issue.

According to the record, the trial court found that the Davises had "unreasonably restricted Plaintiff's rights of ingress and egress to the Property," "unreasonably restricted Plaintiff's reasonable and necessary use of the surface of the Property," and "unreasonably restricted Plaintiff from its full use of the Property." These findings are supported by the following evidence: 1) Floyd Davis stopped a contract crew on March 16, 2001, told

Page 8

136 S.W.3d 419, 160 Oil & Gas Rep. 897 (Cite as: 136 S.W.3d 419)

them they could not work, and the crew left the property; 2) on another occasion, Floyd Davis threatened to "whip" a Devon employee; 3) Lloyd Davis ordered the same Devon employee off his property on a separate occasion while clutching a ballpeen hammer; 4) Floyd Davis told another Devon employee that he was willing to die for his farm and asked if the employee was willing to die for his company; 5) Floyd Davis cursed at Devon's employees and contractors; 6) the Davises told Devon that they will not allow Devon to use caliche for roads; 7) Floyd Davis would not allow a contractor's employee, who had driven his *426 vehicle off the lease road to go around Davis's vehicle, to leave the premises and called the sheriff; 8) Floyd Davis testified he would continue to exercise his right to instruct Devon's employees and contractors about what to do on his land and that there would be "trouble" if caliche was used on his farm; and 9) Floyd Davis testified that he would continue to plow over the lease roads. This is both legally and factually sufficient evidence to support the trial court's findings.

As to the contention that the Davises could not have unreasonably interfered with Devon's use of the property because they were only attempting to enforce the 1991 and 1997 agreements, we previously determined that no such agreements existed regarding the construction of permanent caliche roads. Thus, the documents cannot be used to justify the Davises' actions.

Having overruled each issue, the judgment of the trial court is affirmed.

Tex.App.–Amarillo,2004. Davis v. Devon Energy Production Co., L.P. 136 S.W.3d 419, 160 Oil & Gas Rep. 897

END OF DOCUMENT

TAB #10

Schmidt v. Richardson

Westlaw.

Page 1

--- S.W.3d ----, 2014 WL 117418 (Tex.App.-Dallas) (Cite as: 2014 WL 117418 (Tex.App.-Dallas))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Dallas.

Donal R. **SCHMIDT**, Jr., James Pennington, Thimothy S. Wafford, Judson F. Hoover, Robert B. Fields, Stephen W. Weathers, Mark Hall, Daniel M. Cofall, Penny **Schmidt**, Sierra Foxtrot, LP, Sierra Foxtrot Genpar LLC, and Sun River Energy, Inc., Appellants

Colin **RICHARDSON**, Steven R. Henson, Ginger Toupal, and John Dein, Appellees.

No. 05–13–00206–CV. Jan. 13, 2014.

Background: Shareholder filed derivative action against oil and gas corporation and its officers, alleging conflicts of interest, self-dealing, and fraudulent transfer of corporate assets in connection with transfer of real property and mineral rights, and former board member sued individually for defamation and fraudulent transfer. The 134th Judicial District Court, Dallas County, granted plaintiffs' request for temporary injunction in connection with subject transactions. Defendants took interlocutory appeal.

Holding: The Court of Appeals, Lewis, J., held that mere existence of unexercised contractual rights of foreclosure on part of corporate officers with respect to real property owned by corporation did not give rise to imminent harm warranting temporary injunction.

Reversed and remanded.

West Headnotes

[1] Injunction 212 € 1092

212 Injunction

21211 Preliminary, Temporary, and Interlocutory Injunctions in General

212II(B) Factors Considered in General 212k1092 k. Grounds in General; Multiple Factors. Most Cited Cases

To obtain a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.

[2] Appeal and Error 30 € 354(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k950 Provisional Remedies
30k954 Injunction
30k954(1) k. In General. Most

Cited Cases

Appeal and Error 30 € 954(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k950 Provisional Remedies
30k954 Injunction
30k954(2) k. Refusing Injunction.
Most Cited Cases

Appellate court reviews the trial court's grant of a temporary injunction for an abuse of discretion, with review confined to the validity of the order that grants or denies the injunctive relief.

[3] Appeal and Error 30 \$\iint\$874(2)

30 Appeal and Error 30XVI Review 30XVI(B) Interlocutory, Collateral, and

Page 2

--- S.W.3d ----, 2014 WL 117418 (Tex.App.-Dallas) (Cite as: 2014 WL 117418 (Tex.App.-Dallas))

Supplementary Proceedings and Questions

30k874 On Separate Appeal from Interlocutory Judgment or Order

30k874(2) k. Appeal from Orders Relating to Injunctions. Most Cited Cases

On review of the trial court's grant of a temporary injunction, the appellate court may neither substitute its judgment for that of the trial court nor consider the merits of the lawsuit.

[4] Appeal and Error 30 \$\infty\$920(3)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k920 Interlocutory Orders and Proceedings

30k920(3) k. Injunction. Most Cited Cases

On review of the trial court's grant of a temporary injunction, the appellate court views the evidence in the light most favorable to the trial court's order and indulges every reasonable inference in its favor.

[5] Appeal and Error 30 € 954(1)

30 Appeal and Error 30XVI Review

30XVI(H) Discretion of Lower Court 30k950 Provisional Remedies 30k954 Injunction

30k954(1) k. In General. Most

Cited Cases

On review of the trial court's grant of a temporary injunction, the appellate court may not substitute its judgment for the trial court's judgment unless the trial court's action exceeded the bounds of reasonable discretion.

[6] Injunction 212 \$\infty\$1586

212 Injunction

212V Actions and Proceedings 212V(F) Trial or Hearing 212k1586 k. Questions of Law or Fact. Most Cited Cases

On application for a temporary injunction, the determination of whether imminent harm exists is a question of law for the court.

[7] Injunction 212 € 1042

212 Injunction

212I Injunctions in General; Permanent Injunctions in General

212I(B) Factors Considered in General 212k1041 Injury, Hardship, Harm, or Effect 212k1042 k. In General. Most Cited

Cases

Finding of imminent harm is a prerequisite for injunctive relief.

[8] Injunction 212 € 1469

212 Injunction

212IV Particular Subjects of Relief

212IV(S) Corporations and Other Private Organizations

212k1469 k. Acquisition and Disposition of Property; Mortgages and Security Agreements. Most Cited Cases

Temporary injunctive relief was not available, in shareholder derivative action, to preclude corporate action under resolution permitting corporation's board of directors to take action with respect to hard mineral lease on corporate property without board approval of each step of transaction, absent any showing or finding of imminent harm.

[9] Injunction 212 € 1469

212 Injunction

212IV Particular Subjects of Relief

2121V(S) Corporations and Other Private Organizations

212k1469 k. Acquisition and Disposition of Property; Mortgages and Security Agreements. Most Cited Cases

Mere existence of unexercised contractual rights of foreclosure on part of corporate officers

with respect to real property owned by corporation did not give rise to imminent harm warranting issuance of temporary injunction in shareholder derivative action, where all conditions precedent to exercise of such rights had not yet occurred.

[10] Appeal and Error 30 \$\infty\$842(8)

30 Appeal and Error

30XVI Review

 $30 \mathrm{XVI}(A)$ Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(8) k. Review Where Evidence Consists of Documents. Most Cited Cases

When written instruments can be given a certain or definite legal meaning or interpretation, an appellate court construes them as a matter of law.

[11] Injunction 212 @== 1469

212 Injunction

212IV Particular Subjects of Relief

212IV(S) Corporations and Other Private Organizations

212k1469 k. Acquisition and Disposition of Property; Mortgages and Security Agreements. Most Cited Cases

For purposes of determining shareholders' entitlement to temporary injunctive relief in derivative action, precluding exercise by corporate officers of contractual foreclosure rights with respect to corporate real property, condition precedent for exercise of such rights referencing officers' belief that "prospect" of payment on corporation's notes was impaired restricted applicability of such condition precedent to sixmonth period during which notes were pending and payment was to be made by corporation, and thus could not give rise to any imminent harm after expiration of such six-month period.

[12] Injunction 212 € 1102

212 Injunction

212II Preliminary, Temporary, and Interlocutory Injunctions in General

212II(B) Factors Considered in General

212k1101 Injury, Hardship, Harm, or Effect 212k1102 k. In General. Most Cited

Cases

For purposes of a temporary injunction, imminent harm is established by showing that the defendant will engage in the activity sought to be enjoined.

David Reese Clouston, Christopher Robin Richie, Matthew D. Stayton, Lars L. Berg, for Appellants.

James Pennington, pro se.

Jeffrey Michael Goldfarb, Hamilton Lindley, for Appellees.

Steven R. Henson, pro se.

Before Justices BRIDGES, FILLMORE, and LEWIS.

OPINION

Opinion by Justice LEWIS.

*1 This is an interlocutory appeal from the trial court's granting of a temporary injunction. The injunction granted relief to both Colin Richardson, who brought shareholder derivative claims on behalf of Sun River Energy, Inc. ("Sun River"), and Steven R. Henson, who brought individual claims below. For the reasons discussed below, we reverse the trial court's Order Granting Temporary Injunction (the "Order") and remand the case to the trial court for further proceedings.

Background

Sun River is an oil and gas company. Its primary asset is a significant mineral interest in undeveloped property in Colfax County, New Mexico. Donal R. Schmidt, Jr. is Sun River's President, Chief Executive Officer, and Chairman

of the Board of Directors; Thimothy S. Wafford is the company's Chief Operating Officer; and James Pennington is its General Counsel and Secretary. When the price of natural gas fell precipitously in 2012, Sun River was not able to pay Schmidt, Wafford, or Pennington (collectively, "Officers") their contractual salaries, and by May 2011, the company owed the Officers more than \$5 million. In an effort to keep its management team, Sun River's Board of Directors issued the Officers promissory notes for the amounts owed (the "Notes"). Each Note incorporated a Mortgage Security Agreement, Financing Statement and Assignment of Production and Revenue (the "Mortgages"). Sun River had six months to raise the money promised; if it failed to pay timely on the Notes, the Mortgages gave Officers foreclosure rights on the Colfax County, New Mexico property to secure the amounts owed.

During the six-month period, Sun River negotiated an agreement whereby it obtained \$500,000 and fifty-two percent of a mining company named Maxwell Resources ("Maxwell"), in return for selling Maxwell an interest in certain "hard" minerals (i.e., not oil or gas) in the New Mexico property. Details of the agreement were taking some time to resolve, and the Board approved a resolution allowing Schmidt to close the deal without Board approval of every step taken (the "Maxwell Resolution").

Sun River defaulted on the Notes, but to this Court's knowledge, none of the Officers has taken any steps to foreclose on the New Mexico property.

Appellee Henson is President and Chief Executive Officer of a company named Rangeford Resources, which is alleged to be a competitor of Sun River in terms of acquiring assets in Colfax County, New Mexico. Henson served on the Board of Sun River for a period of time, but he was terminated, purportedly for violating the company's Code of Ethics and Business Conduct by selling securities while in possession of material, non-public information. Appellee Richardson is a Sun

River shareholder and a consultant for Rangeford Resources.

Richardson filed the derivative suit below. He contends the Board's actions in issuing the Notes (and related Mortgages) and the Maxwell Resolution involved conflicts of interest and self-dealing and were designed to fraudulently transfer Sun River's Colfax County asset to the Officers. Henson sued individually for defamation and fraudulent transfer. The two plaintiffs sought and received injunctive relief, enjoining Sun River's Officers and its Board from taking any of the following actions until trial on the merits:

- *2 a. Any and all performance, claims of default, payments, transfers, or other actions pursuant to, based upon or with respect to the Notes and Mortgage, including, but not limited to, any claim, notice or attempt to enforce a default or foreclosure on the Notes and Mortgage;
- b. Any payments on Notes based on claims for allegedly past due compensation to the Individual Defendants without Board Approval and without providing notice to the [P]arties.
- c. Any and all actions or entry into contracts by Defendant Donal Schmidt, Jr. on behalf of Sun River to "enter into any contract on behalf of the Corporation regarding the lease, purchase, or sale of the Corporation's interests in its hard rock minerals, coal, timber, oil, gas and/or other minerals" in Colfax County without [B]oard [A]pproval and without notice to the Parties.
- d. Any and all issuances of shares of stock or the provision of any other compensation, payments, bonuses, gifts, or other transfers by Sun River to Defendants, provided that Sun River is permitted to continue its payroll practices as have been followed in the ordinary course of business since the execution of the Rule 11 Agreement on June 15, 2012 and provided that Sun River need not give notice to Plaintiffs prior to making payroll.

This interlocutory appeal followed.

Standard of Review

[1][2][3][4][5] To obtain a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. Bank of Texas, N.A. v. Gaubert, 286 S.W.3d 546, 551-52 (Tex.App.-Dallas 2009, pet. dism'd w.o.j.). We review the trial court's grant of a temporary injunction for an abuse of discretion. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex.2002). Our review is confined to the validity of the order that grants or denies the injunctive relief. Amalgamated Acme Affiliates, Inc. v. Minton, 33 S.W.3d 387, 392 (Tex.App.-Austin 2000, no pet.). We may neither substitute our judgment for that of the trial court nor consider the merits of the lawsuit. Id. We view the evidence in the light most favorable to the trial court's order and indulge every reasonable inference in its favor. Id. We may not substitute our judgment for the trial court's judgment unless the trial court's action exceeded the bounds of reasonable discretion. Butnaru, 84 S.W.3d at 204.

Imminent Harm

[6] In their first issue, appellants challenge the trial court's finding that appellees could be subject to imminent harm based on the existence of unexercised contractual rights of foreclosure. The determination of whether imminent harm exists is a question of law for the court. *Operation Rescue–National v. Planned Parenthood of Houston Se. Tex., Inc.,* 975 S.W.2d 546, 554 (Tex.1998).

Claims Related to the Maxwell Resolution

[7][8] Initially, we address briefly the alternative basis of appellees' claims for breach of fiduciary duty and fraudulent transfer, namely the Maxwell Resolution. The trial court's Order states that further action under the Maxwell Resolution would result in irreparable harm to appellees, but the Order does not find the harm is imminent. A

finding of imminent harm is a prerequisite for injunctive relief. *Id.* Without such a finding by the trial court, injunctive relief cannot be supported on that ground. Accordingly, we sustain appellants' first issue as to all claims relating to the Maxwell Resolution.

Claims Related to Foreclosure on the Notes and Mortgages

*3 As to claims relating to the Notes and Mortgages, the trial court did make a finding of imminent harm. Appellants challenge that finding, contending that no imminent harm results from the mere existence of unexercised contractual rights of foreclosure. Appellees stress that none of the three Officers has undertaken any step that would be necessary to exercise foreclosure rights: they have given no notice and have instituted no judicial proceedings. Rather, all three Officers testified below they had not decided whether to exercise those foreclosure rights. Appellants rely upon Frey v. DeCordova Bend Estates Owners Ass'n, 647 S.W.2d 246 (Tex.1983). In that case the Texas Supreme Court distinguished "fear or apprehension of the possibility of injury" from actual injury, saying the former would not support injunctive relief. Id. at 248; see also Harbor Perfusion, Inc. v. Floyd, 45 S.W.3d 713, 717 (Tex.App.-Corpus Christi 2001, no pet.) (evidence of "mere fear or apprehension of the possibility of injury" does not establish imminent harm).

Appellees contend the shareholders' risk of actual injury from the Officers is imminent. They point to Sun River's default on the Notes. Given that default, appellees understand the Mortgages to allow the Officers, without giving notice, (a) to take possession of the Colfax County asset or (b) to foreclose upon it, because all of the "triggers" allowing them to do so have occurred.

[9][10][11] When written instruments can be given a certain or definite legal meaning or interpretation, we construe them as a matter of law. *EMC Mortg. Corp. v. Davis*, 167 S.W.3d 406, 413 (Tex.App.-Austin 2005, pet. denied). In this

case, we conclude the Mortgages do control the imminent harm issue, but not in the manner that appellees contend. Section 6 of each Mortgage identifies three incidents of default that could lead to the possession-or-foreclosure remedies appellees fear:

- (1) If there be any default by Mortgagor on Note 1, Note 2 or Note 3 in the payment thereof when and as the same becomes due in accordance with the terms and provisions of the referenced Notes, then Mortgagees, or any one of them, shall give Mortgagor written notice by certified mail setting out such default, and if Mortgagor fails to cure said default within 10 days from the mailing of such notice; or
- (2) If there be any other default by Mortgagor under the terms of the referenced Notes or if at any time any Mortgagee under Note 1, Note 2 or Note 3 deems itself or himself insecure and in good faith believes that the prospect of payment of the amounts due under the Secured Obligations owing to them or him is impaired; or
- (3) If Mortgagor or its successors in interest applies for relief under any bankruptcy or other law for the relief of debtors, suffers, or is adjudicated bankrupt or insolvent under any federal or state law, or makes an assignment for the benefit of creditors, or applies for or suffers the appointment of a receiver, or if a receiver be appointed by any court for any of the Mortgaged Property, and such receiver is not discharged within 30 days after the date of such appointment.
- *4 No party argues the third default provision applies here; there is no issue of bankruptcy or receivership in this case. But appellees contend the second default provision applies, because it speaks to the Officers—"at any time"—having the good faith belief "that the prospect of payment of the amounts due under the Secured Obligations owing to them ... is impaired." The language of this subsection is clearly intended to address

circumstances that could arise during the six-month period the Notes were pending and payment was to be made by Sun River. It speaks to feelings of insecurity as to the prospect of payment. "Prospect," in this context, means "the act of looking forward" or "a mental picture of something to come." WEBSTER'S NEW COLLEGIATE DICTIONARY 945 (9th ed. 1985). Indeed, cases that discuss insecurity clauses generally deal with acceleration of debt, i.e., with requiring all future payments to be made earlier than had been scheduled. See generally Am. Bank of Waco v. Waco Airmotive, Inc., 818 S.W.2d 163 (Tex.App.-Waco 1991, writ denied); Seitz v. Lamar Sav. Ass'n, 618 S.W.2d 142 (Tex.Civ.App.-Austin 1981, no writ). FNI In the case before us, the deadline for payment on the Notes has long since passed. Thus, a mortgage provision providing a remedy for insecurity resulting from a good faith belief the "prospect" for payment is impaired is no longer relevant. We conclude section 6(2) of the Mortgages cannot now operate to create any imminent danger of injury to appellees; it does not apply to the current circumstances of these parties.

[12] Section 6(1) of the Mortgages does apply to the current circumstances. Sun River defaulted on the Notes when they became due, as section 6(1) envisions. However, section 6(1) also contains a condition precedent to the post-default possessionor-foreclosure remedies: the Mortgagees-i.e., the Officers—must give Sun River notice by certified mail setting out the default, and allowing a ten-day opportunity to cure the default. No such notice has been given. Imminent harm is established by showing that the defendant will engage in the activity sought to be enjoined. See State v. Morales, 869 S.W.2d 941, 946 (Tex.1994). Given the guarantee of notice found in section 6(1), and the fact that notice has not been given, we cannot say appellees are threatened with imminent harm. The trial court abused its discretion in deciding to the contrary.

We sustain appellants' first issue as to all

Page 7

--- S.W.3d ----, 2014 WL 117418 (Tex.App.-Dallas) (Cite as: 2014 WL 117418 (Tex.App.-Dallas))

claims relating to foreclosure on the Notes and Mortgages and decide appellants' first issue in their favor.

Conclusion

Appellees have failed to establish they would be subjected to imminent harm without injunctive relief. Accordingly, the trial court's injunction cannot stand. See Operation Rescue—National, 975 S.W.2d at 554 ("A prerequisite for injunctive relief is the threat of imminent harm."). Given our resolution of appellants' first issue, we need not reach either remaining issue. We reverse the trial court's Order and remand this case to the trial court for further proceedings.

FN1. Appellees rely upon a provision in the Notes as part of their argument that "there is no requirement that any of these insiders provide any notice whatsoever to Sun River before taking action." However, the provision states only that "no notices are required to be given by Payee to Maker in the event of default and acceleration." (Emphasis added.) This waiver of a notice requirement for acceleration is in keeping with section 6(2)'s focus of future payments and acceleration during the pendency of the six-month payment period. Acceleration is no longer an issue under the Notes; all payments are past due.

Tex.App.—Dallas,2014.
Schmidt v. Richardson
--- S.W.3d ----, 2014 WL 117418 (Tex.App.-Dallas)

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TAB #11

Texas Rules of Civil Procedure 683



cally address situations in which notice respecting a temporary restraining order has been provided to an adverse party. Further, '[a] temporary restraining order is basically a writ of injunction within the meaning of [TRCP] 682.' Additionally, [TRCP] 687, which sets forth the requisites for a 'writ of injunction,' provides specific requirements in the event such 'writ of injunction' is a 'temporary restraining order.' Accordingly, we cannot agree with [P] that a temporary restraining order is not a 'writ of injunction' subject to the requirements of rule 682."

Mattox v. Jackson, 336 S.W.3d 759, 763 (Tex. App.—Houston [1st Dist.] 2011, no pet.). "A verified petition for injunctive relief is not required to grant a temporary injunction ... when a full evidentiary hearing on evidence independent of the petition has been held."

Crystal Media, Inc. v. HCI Acquisition Corp., 773 S.W.2d 732, 734 (Tex.App.—San Antonio 1989, no writ). "If the insufficiency of the verification is not objected to prior to the introduction of evidence the defect [is] waived."

TRCP 683. FORM & SCOPE OF INJUNCTION OR RESTRAINING ORDER

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.

History of TRCP 683: Amended eff. Apr. 1, 1984, by order of Dec. 5, 1983 (661-62 S.W.2d [Tex.Cases] (xvi): Added last paragraph. Adopted eff. Sept. 1. 1941, by order of Oct. 29-1940 (3 Tex.B.J. 631 [1940]). Source, FRCP 65(d).

See Commentaries, "Impunctive Relief," ch. 2 C. p. 125: Request for Find rings of Fact & Conclusions of Law," ch. 10 E. p. 843; O'Connor's Texas Forms FORMS 2C 3, 4

ANNOTATIONS

Qwest Comms, v. AT&T Corp., 24 S.W.3d 334, 337 (Tex.2000). The TRCPs "require that an order granting a temporary injunction set the cause for trial on the

merits and fix the amount of security to be given by the applicant. These procedural requirements are mandatory, and an order granting a temporary injunction that does not meet them is subject to being declared void and dissolved." See also InterFirst Bank San Felipe v. Paz Constr. Co., 715 S.W.2d 640, 641 (Tex.1986)

Ex parte Slavin, 412 S.W.2d 43, 44 (Tex.1967), An injunction decree "must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him." See also RCI Entm't (San Antonio), Inc. v. City of San Antonio, 373 S.W.3d 589, 603 (Tex.App.—San Antonio 2012, no pet.); Murray v. Epic Energy Res., 300 S.W.3d 461, 470-71 (Tex.App.—Beaumont 2009, no pet.).

Layton v. Ball, 396 S.W.3d 747, 753 (Tex.App.--Tyler 2013, no pet.). "Rule 683 is not violated when documents are attached to the injunction and referred to it as part of the injunction, because the attachments become part of the injunction itself."

RCI Entm't (San Antonio), Inc. v. City of San Antonio, 373 S.W.3d 589, 603 (Tex.App.—San Antonio 2012, no pet.). "An injunction should be broad enough to prevent a repetition of the wrong sought to be corrected. But, it must not be so broad as to enjoin a defendant from activities that are a lawful and proper exercise of his rights. Where a party's acts are divisible, and some acts are permissible and some are not, an injunction should not issue to restrain actions that are legal or about which there is no asserted complaint. Thus, the entry of an injunction that enjoins lawful as well as unlawful acts may constitute an abuse of discretion." See also Computek Computer & Office Sups. v. Walton, 156 S.W.3d 217, 221 (Tex.App.—Dallas 2005, no pet.).

Senter Invs. v. Veerjee, 358 S.W.3d 841, 845-46 (Tex.App.—Dallas 2012, no pet.). Appellant "asserts the temporary injunction is void because it does not contain an order setting the case for trial on the merits. [TRCP] 683 requires every order granting a temporary injunction to include such an order. However, because this case involves a temporary injunction pending arbitration, we must also consider the application of the [Texas Arbitration Act (TAA)]. [¶] Once [appellant] decided to invoke the arbitration provision and the trial court compelled arbitration, the trial proceedings were governed by the TAA as well as the rules of civil procedure. Under the TAA, the trial court was required to stay

TEXAS RULES OF CIVIL PROCEDURE

INJUNCTIONS TRCP 683 - 684



the trial proceedings pending arbitration, subject to its jurisdiction to grant orders under [CPRC] \$171.086, including an injunction. [¶] The specific provisions of the TAA in this circumstance control over the rules of civil procedure; therefore, the temporary injunction order properly abated the trial court proceedings."

Intercontinental Terminals Co. v. Vopak N. Am., Inc., 354 S.W.3d 887, 899 (Tex.App.—Houston [1st Dist.] 2011, no pet.). "Rule 683 mandates that a trial court granting a temporary injunction must explain in the order its reasons for believing that the applicant has shown that it will suffer injury if interlocutory relief is not granted but does not require the trial court to provide reasons for believing that the applicant has shown a probable right to final relief. An explanation of the pending harm to the temporary injunction applicant, along with a specific recitation of the conduct enjoined, is all that is necessary to achieve Rule 683's purpose: 'to inform a party just what he is enjoined from doing and the reasons why he is so enjoined.' For these reasons, we hold that Rule 683 does not mandate that the trial court's order expressly state that the trial court found a probable right of recovery." See also Russell v. Waterwood Imprv. Ass'n, No. 09-11-00413-CV (Tex.App.--Beaumont 2011, no pet.) (memo op.; 11-17-11) (specificity requirement is not satisfied by mere recital of no adequate remedy at law and irreparable harm).

Emex Holdings, LLC v. Naim, No. 13-09-591-CV (Tex.App.—Corpus Christi 2010, no pet.) (memo op.; 5-27-10). "Requiring a trial date to be placed in every injunction order prevents a temporary injunction from effectively becoming permanent without a trial. [It] also places the onus upon the party requesting injunctive relief to renew the injunction if the trial is delayed beyond the trial date set forth in the order. [¶] [R]eference to an existing docket control order is not a substitute for stating a trial date in the order itself. Logically, if a preexisting docket control order is insufficient to comply with rule 683, then a yet to be entered docket control order ... does not comply either." See also State Bd. for Educator Certification v. Montalvo, No. 03-12-00723-CV (Tex.App.—Austin 2013, no pet.) (memo op.; 4-3-13) (temporary injunction order without trial date is void, not voidable); In re Marriage of Grossnickle, 115 S.W.3d 238, 244 (Tex.App.—Texarkana 2003, no pet.) (requirement that injunction order set cause for trial on the merits is effectively same as requiring specific trial date to be set in the order).

Qaddura v. Indo-European Foods, Inc., 141 S.W.3d 882, 891-92 (Tex.App.—Dallas 2004, pet. denied). "Rule 683 provides that an order granting an injunction 'shall set forth the reasons for its issuance.' This rule, however, applies only to temporary restraining orders and temporary injunctions, not permanent injunctions."

Fasken v. Darby, 901 S.W.2d 591, 593 (Tex. App.—El Paso 1995, no writ). "An injunction that fails to identify the harm that will be suffered if it does not issue must be declared void and be dissolved. This rule operates to invalidate an injunction even when the complaining party fails to bring the error to the trial court's attention." See also Big D Props., Inc. v. Foster, 2 S.W.3d 21, 23 (Tex.App.—Fort Worth 1999, no pet.) (Rule 683's requirements cannot be waived). But see Texas Tech Univ. Health Sci. Ctr. v. Rao, 105 S.W.3d 763, 768 (Tex.App.—Amarillo 2003, pet. dism'd) (error waived). For more cases dealing with waiver of TRCP 683's requirements, see "Dissolve," ch. 2-C, §8.2.2(2), p. 135.

TRCP 684. APPLICANT'S BOND

In the order granting any temporary restraining order or temporary injunction, the court shall fix the amount of security to be given by the applicant. Before the issuance of the temporary restraining order or temporary injunction the applicant shall execute and file with the clerk a bond to the adverse party, with two or more good and sufficient sureties, to be approved by the clerk, in the sum fixed by the judge, conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.

Where the temporary restraining order or temporary injunction is against the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is such that the State, municipality. State agency, or subdivision of the State in its governmental capacity, has no pecuniary interest in the suit and no monetary damages can be shown, the bond shall be allowed in the sum fixed by the judge, and the liability of the applicant shall be for its face amount if the restraining order or temporary injunction shall be dissolved in whole or in part. The discretion of the trial court in fixing the amount of the bond shall be subject to review. Provided that under equitable circumstances

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